Supreme Court, U.S.
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No. ____

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1994

SHORT HILLS ASSOCIATES, f.k.a.
Prutaub Joint Venture, *Petitioner,*

*v.*

NEW JERSEY COALITION AGAINST WAR IN THE MIDDLE EAST, SYLVIA ACKELSBERG, and DAVID CLINE, *et al., Respondents.*

**On Petition for a Writ of Certiorari to the Supreme Court of New Jersey**

## PETITION FOR A WRIT OF CERTIORARI

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31 pp

## QUESTIONS PRESENTED

1. Does a state court order that requires a shopping center owner to furnish a valuable portion of the owner's private property to political and social action groups to espouse causes opposed by the owner constitute a forced subsidization of another's speech in violation of the First Amendment?

2. Does a state court order that grants an easement to political and social action groups to occupy a valuable portion of a privately-owned shopping center for the purpose of espousing their causes, without either using the state's power of eminent domain or paying for the easement, violate the Takings Clause of the Fifth Amendment?

## LIST OF PARTIES

The other parties in the caption, listed as automatic respondents, are:

J.M.B. Realty Corporation
Cherry Hill Center, Inc.
Kravco, Inc.
Equity Properties & Development Co.
Rockaway Center Associates
Woodbridge Center, Inc.
Livingston Mall Venture
Hartz Mountain Industries, Inc.

All parties to the proceeding in the Supreme Court of New Jersey appear in the caption of the case.

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SHORT HILLS ASSOCIATES, f.k.a.
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*v.*

NEW JERSEY COALITION AGAINST WAR IN THE MIDDLE EAST, SYLVIA ACKELSBERG, and DAVID CLINE, *et al., Respondents.*

**On Petition for a Writ of Certiorari to the Supreme Court of New Jersey**

## PETITION FOR A WRIT OF CERTIORARI

The petitioner, Short Hills Associates,[1] respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of New Jersey in this case.

## OPINIONS BELOW

The opinion of the Supreme Court of New Jersey (4-3 decision), together with the dissenting opinion of Justice Garibaldi, is reported at 138 N.J. 326, 650 A.2d 757. (The slip opinion is reproduced at App. 1a-80a.)[2] The per curiam opinion of the Superior Court of New Jersey, Appellate Division, is reported at 266 N.J. Super. 159, 628 A.2d 1075. (Slip op., App. 83a-86a.) The opinion of the Superior Court of New Jersey, Chancery Division, Bergen County, is reported at 266 N.J. Super. 195, 628 A.2d 1094. (Slip op., App. 87a-114a.)

[1]Short Hills Associates, a New Jersey partnership, is a continuation of the partnership formerly named Prutaub Joint Venture.

[2]The grant of the petition and of the cross-petition for certification to the state supreme court is reported at 134 N.J. 564, 636 A.2d 522. (App. 81a, 82a.)

## JURISDICTION

The judgment of the Supreme Court of New Jersey was entered on December 20, 1994. (App. 115a-116a.) The supreme court denied the petitioner's timely motion for reconsideration by an order dated February 23, 1995, and filed February 24, 1995. (App. 117a.)

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend. I:

"Congress shall make no law . . . abridging the freedom of speech . . . ."

U.S. Const. amend. V:

". . . nor shall private property be taken for public use, without just compensation."

U.S. Const. amend. XIV, § 1:

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

## STATEMENT OF THE CASE

### A. Proceedings Below

On November 5, 1990, the respondents (as plaintiffs), New Jersey Coalition Against War in the Middle East and individual members of the coalition (collectively, the "Coalition"), filed a complaint for injunctive relief in the Superior Court of New Jersey, Chancery Division, Bergen County, against the owner of each of 10 shopping centers, including the petitioner, seeking temporary restraints to enjoin the owners "from preventing or interfering with the plaintiffs and their associates from distributing

pamphlets/flyers at each" of the 10 shopping centers on November 10, 1990. (Compl. 15, ¶ 1.) The trial court denied the Coalition's two applications for a temporary restraining order (and its motion for a preliminary injunction) following hearings, and the appellate division and the state supreme court each twice denied leave to appeal the interlocutory rulings. (*See* Pls.' App. (App. Div.) 81-83.)

1. How the Federal Questions Were Raised

The petitioner filed a counterclaim and an amended counterclaim against the Coalition, seeking declaratory and injunctive relief on Federal grounds. In particular, the pleadings claimed that the Coalition's political activities on the petitioner's private property, if commanded by the courts of the state, would abridge the petitioner's freedoms of speech and belief and of association under the First and Fourteenth Amendments to the Constitution of the United States and would deprive the petitioner of its property without due process of law and without just compensation guaranteed by the Fifth and Fourteenth Amendments to the Constitution. (App. 121a-127a, 133a-139a.)

2. How the Federal Questions Were Passed Upon and the Judgments Below

After an 11-day trial, the court entered judgment against the Coalition on its complaint and against the petitioner on its counterclaim. *New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp.*, 266 N.J. Super. 195, 204, 628 A.2d 1094, 1099 (Ch. Div. 1991). (App. 96a-97a.) An Order for Judgment followed on August 14, 1991. (App. 115a-116a.) The trial court found that the malls are retail establishments "designed to help customers focus upon the stores and the products contained in each of them," "[t]hey are designed and managed to induce impulse shopping," and the tenants pay for the maintenance of the common areas but are restricted from using these areas "except in the event of a mall sponsored promotion or event." *New Jersey Coalition*, 266 N.J. Super. at 200, 202, 628 A.2d at 1097, 1098. Addressing the relationship of the Coalition's

proposed use for political leafleting to the owners' actual use of their property, the court found:

> There has been no testimony or proofs offered that any of the defendant malls permit free and unfettered access and/or activities to their mall premises whether it be in the interior common areas, on the sidewalks surrounding the mall buildings or in the parking lots which are adjacent to the mall premises. The credible testimony offered by the defendants indicates that activities which are perceived by mall management to be controversial in nature or confrontational are not permitted. Effectively, every effort is made to avoid two-sided issues. Specifically outside activities of either a religious or a political nature are avoided. . . .
>
> . . . As a result of judgments made by the owners and operators of each of the malls and policies which they have established, each has embarked upon a program as to how to best manage their property and conduct their business. The plaintiffs have not met their burden of proving that their activities are not discordant with both the public and private uses to which these shopping malls are dedicated.

*Id.* at 203-04, 628 A.2d at 1099.[3]

The appellate division affirmed the trial court's Order for Judgment. *New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp.*, 266 N.J. Super. 159, 628 A.2d 1075 (App. Div. 1993) (per curiam). (App. 83a-86a.) The Supreme Court of New Jersey, in turn, by a four to three majority, reversed, declaring that the Coalition has a state constitutional right to leaflet at all regional shopping centers in New Jersey, including the petitioner's, and that that right is not inconsistent with Federal constitutional guarantees. *New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp.*, 138 N.J. 326, 650 A.2d 757 (1994) (4-3 decision). (App. 1a-80a.) On December 30, 1994, the petitioner filed in the supreme court a motion for reconsideration. By an order filed on February 24,

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[3]The opinion did not discuss the petitioner's counterclaim.

1995, the supreme court denied the motion for reconsideration. (App. 117a.)

### B. The Respondents

The Coalition is a loose affiliation of activist groups that have engaged in an extensive array of partisan activity.[4] It is comprised of several dozen organizations with over 25,000 members, and it engages in political activities, including "holding public meetings and similar activities directed to generating discussion and activity." (App. 141a, ¶ 1.) The Coalition's actions in this case stem from its efforts to "educat[e] the public about the growing costs of hostilities in the Persian Gulf" (Compl. 2, ¶ 1), but not through traditional, grass-roots door-to-door leafleting. Instead, by this lawsuit, it seeks to concentrate its efforts on leafleting, engaging passersby, and soliciting contributions at privately-owned shopping malls, including The Mall at Short Hills, without the property owners' consent.

In addition to organizations specifically formed in opposition to the war in the Persian Gulf, the Coalition includes various other groups, such as the Baptist Peace Fellowship, the Monmouth County Coalition for the Homeless, and the New Jersey Council of Churches. (App. 142a, ¶ 6.) These various groups within the Coalition have conducted public hearings in Jersey City, teach-ins and public forums at churches and universities, gatherings at congressional offices, a rally at McGuire Air Force Base, vigils at local hospitals, and two all-day marches in Washington, D.C., as well as other activities described in the various press releases admitted into evidence. (Prutaub, JMB's App. (App. Div.) 32-49.) Indeed, even though the Coalition was denied access to the defendant-shopping malls, it boasts that it handed out over 85,000 leaflets elsewhere during the two weeks preceding the November 28, 1990, hearing on its application for temporary restraints. (App. 142a, ¶ 8.)

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[4]One month *after* this suit was commenced, the Coalition filed articles of incorporation. (*See* Tr. (6/3/91) 62.) The Coalition carries no liability insurance of any kind. (Tr. (6/3/91) 65.)

### C. The Mall at Short Hills

The petitioner owns The Mall at Short Hills, a high-fashion shopping center located in the suburban community of Short Hills, New Jersey.[5] The mall caters to an affluent clientele with some 120 specialty stores and boutiques, such as Gucci and Barney's New York, leased to individual tenants, as well as Saks Fifth Avenue and two other department stores. (*See* Tr. (6/24/91) 11.) The common areas of passage between the stores were constructed and are maintained to provide a neutral, non-competitive, nondisruptive ambience that draws the customers' attention into the various stores. The tenants pay for the security, insurance, cleaning, electricity, heating, air conditioning, and upkeep of these common areas. (App. 143a, ¶ 13.)

Each of the tenants has a lease requiring the payment of a percentage of its sales to the owner (Tr. (6/17/91) 19-20), and, not surprisingly, the primary purpose of The Mall at Short Hills is to maximize the sales of its tenants. (Tr. (6/7/91) 70, 79.) The owner's goal is that the patrons freely flow through the common areas and into the stores. As one of the architectural planners of the mall testified, virtually every design element from floor to ceiling is intended to subordinate the common areas and to enhance the storefronts and the merchandise within, even the color scheme, which is monochromatic:

> It's subdued, very calm, very serene atmosphere which is very important in getting the customer to concentrate on the experience and merchandise displayed in the stores so that the mall itself does not become a distraction by virtue of its business with the colors and textures and things happening inconsistent with our primary purpose.

(Tr. (6/7/91) 85-86.)

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[5]The Mall at Short Hills is private property. No public property was dedicated for private use in the development of the mall. (Tr. (6/17/91) 35-36.) The mall receives no tax subsidies or abatements. (Tr. (6/17/91) 36.) There are no residential structures at The Mall at Short Hills, no professional offices, such as those of doctors, lawyers, or accountants, no post offices, no places of religious worship, and no public buildings. (Tr. (6/17/91) 37-39.)

Great expense and effort is taken to break down the demarcation between the storefronts and the common areas so that customers will be drawn into the stores instead of the common areas (where the Coalition wants to proselytize). Most important in this regard is the preservation of clear sight lines to the stores. Structural columns are located behind storefronts instead of in the mall, architecturally sophisticated railings are constructed of transparent glass, and tenants are required to construct their storefronts at specified angles and in conformity with strict appearance guidelines to attract customers. (Tr. (6/7/91) 81, 84, 87-88.)

Perhaps most indicative of the financial investment in the common areas and the value these areas give to the property is the owner's treatment of kiosks. While some malls place kiosks (small island spaces) in their common areas for tenant rental, either year round or during peak seasons, the owner of The Mall at Short Hills deliberately designed the common areas to be free from distraction and, therefore, elected to not allow kiosks, which, in the owner's business judgment, denigrate the mall's aesthetic atmosphere and obscure sight lines to the stores. (Tr. (6/17/91) 28-30.) The owner made this decision despite the fact that kiosks in the center of the mall alone could have generated up to $500,000 in annual rental. (Tr. (6/17/91) 29.)

To further the purpose of maintaining a nondisruptive environment in the common areas, none of the tenants is permitted to solicit business or to distribute leaflets or advertising matter in the common areas, and no politicking is allowed. (Tr. (6/17/91) 23, 25, Tr. (6/24/91) 7-8.) In addition, as stipulated by the Coalition, the mall uniformly, without discrimination, applies a trespass policy that prohibits "soliciting, speech making, distributing handbills or other literature, seeking signatures on petitions, or taking surveys." (App. 143a, ¶ 17, 144a, ¶ 20.) The Mall at Short Hills does not even permit the Boy Scouts or Girl Scouts, the Red Cross, or the Salvation Army to appear on its premises (*see* App. 144a, ¶ 19), and it allows no art shows, lectures, flower shows, or the like. (*See* Tr. (6/24/91) 11.)

The majority of the Supreme Court of New Jersey made findings or took judicial notice of supposed facts that do not apply to The Mall at Short Hills and, in some cases, are contrary to the express Stipulation of Facts of the petitioner and the Coalition. For example, while the majority states that "[t]he centers, moreover, have apparently not excluded the partisan political speech often found in voter registration drives, most of which were sponsored by party organizations or candidates, and especially found in the conduct of the candidates (and presumably their aides) as they walk through the mall," *New Jersey Coalition*, 138 N.J. at 360, 650 A.2d at 774, the Coalition stipulated that, in fact: "The Mall at Short Hills does not allow its common areas to be used for political functions," and it "has never allowed partisan political activities on its private property." (App. 144a, ¶¶ 18, 23.) No voter registration drive or candidate walk-through has ever been permitted at The Mall at Short Hills.

While the majority mentions a variety of public service activities that occur at various shopping centers, including providing access to community groups, permitting leafleting, and sponsoring other events that included political speech or issues of civic importance, *New Jersey Coalition*, 138 N.J. at 340-42, 650 A.2d at 764-65, *none* of these activities has ever taken place at The Mall at Short Hills. Indeed, the Coalition conceded that The Mall at Short Hills "appears not to sponsor any public service activities." (Pls.' Br. (App. Div.) 32.) In fact, the mall sponsored only three types of events in 1990 and 1991 - concert performances, Santa Claus at Christmas, and Peter Rabbit at Easter, *New Jersey Coalition,* 138 N.J. at 385-86 app. B, 650 A.2d at 787 app. B, each of which was designed to draw targeted customers into the mall. (Tr. (6/24/91) 12-14.)[6]

The petitioner's plan of operation for its mall is the result of business judgment backed by substantial investment. (Tr. (6/7/91) 69-88, Tr. (6/17/91) 3-6, 12-13, 15-18, 19, 21, 25.)

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[6] As the manager of The Mall at Short Hills testified, the music performances were scheduled to build up traffic during the time that two of the mall's anchor tenants, Bonwit Teller and B. Altman, closed, and the concert series has not been repeated since. (Tr. (6/24/91) 12-13.)

Secondary buying by shoppers, which are impulsive purchases from stores other than the initial one that brought the shopper to the mall (frequently one of the department stores), is the single most important factor in the overall success of the mall. (Tr. (6/17/91) 15-16.) The likelihood and frequency of secondary purchases is greatly enhanced by the construction and maintenance of the common areas of the mall in a comfortable, nonconfrontational, nondisruptive state. (Tr. (6/17/91) 15-16.)

The injection of political activity into this environment would have a powerful effect on shopping behavior. At the very least, it would distract shoppers during their travel through the interior common areas from store to store. Worse yet, especially with controversial groups and issues, it would divert shoppers from the tenants' retail stores. (Tr. (6/17/91) 6-8, 11, 30-31, 97-98.) Gallup market research introduced into evidence shows that from one-third to two-fifths of New Jersey mall patrons would alter their shopping behavior (i.e., go out of their way or shop less) or avoid the mall altogether to shun leafleting or solicitation by political or religious groups. (App. 154a-157a.)[7]

Significantly, in addition to opposing the Coalition's presence in the mall because its activity is inconsistent with the mall's investment-backed purpose and the mall's invitation to the public, the petitioner wishes to exclude the Coalition because it objects to the Coalition's political program. The majority of the state supreme court entirely ignored this crucial fact, stipulated by the parties: the owner of the mall disagrees with the Coalition's message. (App. 143a, ¶ 15.)

The majority ultimately justified its decision on its *judicial notice* of the "fact" that shopping centers have "displaced the downtown business districts" of New Jersey. *See New Jersey Coalition,* 138 N.J. at 346-47, 650 A.2d at 767-68. Nevertheless, the Coalition's own planning expert explicitly testified that

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[7] *See* testimony of Scott S. Ahlstrand, Senior Project Manager and Professional Analyst for The Gallup Organization, Inc., and the tabular results and the report of Selection Research, Inc. (the parent company of Gallup), admitted into evidence as Exhibits D6 and D7. (Tr. (6/6/91) 23, 51-52, 76, 87-90, 96, 100-03, 105-07, 109-11.)

shopping malls have *not* "replaced" the downtown areas. (Tr. (6/5/91) 49.) In fact, the Coalition's political expert testified that the municipalities, with their shopping areas, supermarkets, and movie theaters, provide better opportunities for leafleting than they did in the 1970's. (Tr. (6/3/91) 157.)[8] Indeed, the record shows that the towns surrounding certain of the malls, including The Mall at Short Hills, have remained vital, have new and larger businesses and business districts, and have generated an ever-increasing retail sales volume. (*See* Tr. (6/3/91) 77-78, 152-53, 155-56, Tr. (6/5/91) 54-55.)

## REASONS FOR GRANTING THE PETITION

This is a case about the collectivization of private property in the supposed service of preserving free speech. The Supreme Court of New Jersey in the present case, *New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp.*, 138 N.J. 326, 371, 650 A.2d 757, 780 (1994) (4-3 decision), believes that private property owners who, "for their profit," develop successful shopping centers "must be held to have relinquished" their right to not subsidize others' speech. Accordingly, relying on *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), the state court commands the owner of The Mall at Short Hills to underwrite the speech of the Coalition and allow it to spread its message - a message with which the owner disagrees - on the owner's private property. But in the 15-year interim since *PruneYard*, a case which did not address the issue of subsidization, it has become clear that freedom of speech - the shopping center owners' as much as the protesters' - necessarily includes the freedom to not contribute to political ventures as well as to contribute to them. And even if shopping center owners can be pressed into service against their will, they must be compensated

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[8] The Coalition's political expert further testified that, even though he had conducted many successful political campaigns during his career, he never distributed leaflets at an enclosed shopping mall (Tr. (6/3/91) 144-45), and he admitted that "there are other effective ways to distribute literature." (Tr. (6/3/91) 142.) Even door-to-door leafleting, according to the expert, while not good for a "crisis situation," is "very, very effective in the long run." (Tr. (6/3/91) 116-17.)

in full for the expenses and the lost revenues associated with the taking of their property; they may not be told that they alone must bear the costs generated by others.

## I. THE STATE SUPREME COURT FORCES THE OWNER OF THE MALL AT SHORT HILLS TO SUBSIDIZE THE POLITICAL SPEECH OF THE COALITION IN VIOLATION OF THE FIRST AMENDMENT

The principle of "freedom of speech" is inconsistent with the proposition that a person should be required to subsidize the speech of another. The issue in this case, then, is whether a state court, interpreting its state constitution, may balance the speech rights of one person against those of another and compel one person to subsidize another's political speech. Although the Supreme Court of New Jersey said that it relied on this Court's ruling in *PruneYard* to justify just such an imposition, *PruneYard* did not address the issue of whether the state may compel one private citizen to subsidize the political activities of another private citizen.[9] Such a compulsion, this Court has repeatedly said, is flatly prohibited by the First Amendment. *Lehnert v. Ferris Faculty Ass'n,* 500 U.S. 507 (1991).

The forms that subsidies can take are protean. One may camouflage the subsidy by exacting it in kind instead of in cash. Just that is done in the present case when the Coalition demands the right to use, for its own selfish purposes, the owner's property free of charge. It surely would be constitutionally indefensible for

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[9] This issue was not briefed by the parties in *PruneYard* presumably because of the limited record that came to this Court (the trial court had granted summary judgment), and only Justices White and Powell, concurring in part and in the judgment, expressed concern about the issue. Justice Powell commented that, "[e]ven if a person's own speech is not affected by a right of access to his property, a requirement that he lend support to the expression of a third party's views may burden impermissibly the freedoms of association and belief protected by the First and Fourteenth Amendments." *PruneYard*, 447 U.S. at 98 n.2 (Powell, J., concurring). As he explained, this may amount to "an unacceptable 'compelled subsidization.' " *Id.* (quoting *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 237 (1977)).

the state to extract from the owner a cash contribution to the Coalition. It is no better if the state simply forces the owner, without any choice at all, to provide the Coalition with a forum, a soapbox.

Unlike in the *PruneYard* case (with just seven findings of fact made by the trial court on summary judgment), the record in this case was developed during 11 days of trial testimony and by stipulations of fact showing that the relief sought by the Coalition amounts to a forced subsidization of its political cause. The record shows that the petitioner's wholly-enclosed shopping center[10] was carefully designed and built at great additional expense to create an elegant environment - neutral and apolitical in all respects.[11]

It is precisely this private space that the Coalition wants to appropriate as a forum for its causes: not because its activity is in any way " 'related in its purpose to the use to which the shopping center property [is] being put,' " *Lloyd Corp. v. Tanner*, 407 U.S. 551, 563 (1972) (quoting *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 320 n.9 (1968)), and not because it has no "adequate alternative avenues of communication." *Id.* at 567.[12] Rather, the Coalition wants this particular private space as its forum precisely because the petitioner's expense and effort have made it attractive, comfortable, safe, heated in the winter, and air-conditioned in the summer. (And that environment - so carefully planned - is the reason why the tenants pay an industry-high rental.)

The mall's tenants alone pay for the maintenance and upkeep of the mall, including the costs of security, insurance,

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[10] The PruneYard Shopping Center is an open-air shopping center.

[11] While some mall owners, exercising *their* business judgment, do turn a part of their property into a forum by granting access to political, charitable, and not-for-profit groups, the petitioner allows no such activities to interfere with its investment in creating a retail environment free from distraction and with its decision to not lend a forum in support of any third party's political, religious, social, or philanthropic views.

[12] After all, the Coalition managed to hand out over 85,000 leaflets in places *other* than shopping centers during the two weeks preceding its application for temporary restraints. (App. 142a, ¶8.)

cleaning, electricity, heating, air conditioning, and upkeep. Yet the tenants themselves are expressly prohibited from distributing handbills or advertising material in the common areas. The Coalition certainly could not insist that the tenants make a contribution to its political campaign; it is hardly better for the state to impose that obligation on the tenants - in effect, an additional common area maintenance charge.

The magnitude of the imposition on the petitioner and the tenants is borne out by the expert testimony of Scott S. Ahlstrand, professional analyst for The Gallup Organization. His research reflects that, of those adult New Jersey residents who go to shopping malls at least once a month:

- Thirty-three percent would either go out of their way, or try to avoid a group if not inconvenient, if they were confronted with a group soliciting contributions or distributing information in a shopping mall.
- Forty-one percent agree or strongly agree that they would shop less at those malls where political or religious action groups were present.
- Forty-one percent agree or strongly agree that they would look for other places to shop if political or religious action groups were at the malls where they shopped.
- Twenty-three percent would shop less at those malls where anti-war action groups were distributing information and speaking.

(App. 154a-157a.)[13]

The enormity of the imposition is made yet more evident by a critical fact in this case: "The owners of The Mall at Short Hills disagree with the plaintiffs' political message." (App. 143a, ¶15.) This undisputed fact, missing in *PruneYard*, shows that, although the petitioner opposes the political program of the Coalition, the

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[13] This research does not even address the powerful effect that extreme groups would have on the shopping behavior of parents who bring their children to the mall's safe and controlled environment for back-to-school or holiday shopping.

petitioner has been forced by the Supreme Court of New Jersey to subsidize it nonetheless. It hardly matters that the customers of the mall may (imperfectly) realize that the statements made by the Coalition do not represent the views of the petitioner. *See PruneYard*, 447 U.S. at 87 (the activists' views "will not likely be identified with those of the owner.").[14] Certainly, the members of the Coalition may not stick their hands into the pockets of the petitioner for cash with a promise that the money will not be spent for purposes that the petitioner opposes.

Chief Justice Wilentz meets this point with the shocking conclusion that the petitioner has *relinquished* its right of free speech:

> [P]rivate property owners who have so transformed the life of society for their profit (and in the process, so diminished its free speech) must be held to have relinquished a part of *their* right of free speech. They have relinquished that part which they would now use to defeat the real and substantial need of society for free speech at their centers; they should not be permitted to claim a theoretically-important right of silence from the multitudes they have invited.

*New Jersey Coalition,* 138 N.J. at 371, 650 A.2d at 780.[15]

The insights of James Madison and Thomas Jefferson, as relevant today as when they were penned, serve as an articulate response to the Chief Justice's cavalier dismissal of the petitioner's constitutional right as a punishment for its economic foresight and success:

> "James Madison, the First Amendment's author, wrote in defense of religious liberty: 'Who does not see . . . [t]hat the

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[14]In fact, there is no reason to suppose that listeners will *not* mistake the sponsorship of the objectionable views. The Coalition itself mistakenly asserted that Riverside Square Shopping Center sponsored the display of yellow ribbons in one or two tenant-stores during the Iraq war. (Pl.'s Br.(App. Div.) 11 & n.22.)

[15]Where next? If the home-shopping networks "supplant" shopping centers, will the network owners be required to carry political messages free of charge?

> same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?' 2 The Writings of James Madison 186 (G. Hunt ed. 1901). Thomas Jefferson agreed that 'to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical.' I. Brant, James Madison: The Nationalist 354 (1948)."

*Chicago Teachers Union, Local No. 1 v. Hudson,* 475 U.S. 292, 305 n. 15 (1986) (quoting *Abood v. Detroit Bd. of Educ.,* 431 U.S. 209, 234-35 n.31 (1977)).

In this Court's decision in *PruneYard*, the full case for the owner's freedom of speech was not explored, and the Court was content to say that, so long as the public at large did not identify the owner with the message that was delivered, no First Amendment claim could be raised. *PruneYard*, 447 U.S. at 87.[16] But subsequent decisions of this Court have made it clear that the guarantee of freedom of speech embraces more than the ability to disclaim sponsorship of a political message. The right carries with it the right not to speak, the right to decline to foster particular political causes, the right "to exclude individuals with ideologies or philosophies different from those of [the owner]." *Roberts v. United States Jaycees*, 468 U.S. 609, 627 (1984). Dissociation in

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[16] Nonetheless, Justice Powell, concurring in part in *PruneYard*, saw a potential problem in the forced association of an owner with "speakers who wish to use his premises as a platform for views that he finds morally repugnant," listing as examples, "[a] minority-owned business confronted with distributors from the American Nazi Party or the Ku Klux Klan, a church-operated enterprise asked to host demonstrations in favor of abortion, or a union compelled to supply a forum to right-to-work advocates." *PruneYard*, 100 U.S. at 99 (Powell, J., concurring). The infringement of First Amendment rights in *PruneYard* was only potential because, in that case, there was no allegation that the property owner "disagree[d] with the messages at issue." *Id.* at 98 n.2. *See also Pacific Gas & Elect. Co. v. Public Utils. Comm'n of Cal.*, 475 U.S. 1, 12 (1986) ("[T]he owner did not even allege that he objected to the content of the pamphlets . . . ."). Justice Powell's concern is brought to the forefront in the present case because it is stipulated that the owner here *does* disagree with the Coalition's political message. (App. 143a, ¶15.)

the eyes of the public at large is not sufficient to protect the interests in freedom of speech held by the persons whose wealth has been commandeered into a cause with which they do not agree. Rather, they have the right to resist the forced subsidy altogether. As the Court had said in *Wooley v. Maynard*, 430 U.S. 705, 714 (1977): "A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts." And the person who cannot be required to bear the expression "Live Free or Die" on his license plate surely cannot be required to turn over his property, even in part, to political groups with which he stands in opposition.

This principle is clearly enunciated in the recent decision in *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991). In that case, the question was the purposes to which a union could use the dues collected from its nonmembers. The basic structure of collective bargaining operates on the assumption that the union bargains for all workers in the unit, so, in order to protect against "free riding," the union may charge all workers, even nonmembers, for collective bargaining activities. In *Lehnert*, however, the forced contribution was spent not for collective bargaining, but for matters of general political or social concern. The issue at that point was whether a person may be compelled to support views that he opposes, even if supported by the majority of the union members. The Court said no: "[T]he State constitutionally may not compel its employees to subsidize legislative lobbying or other political union activities outside the limited context of contract ratification or implementation." *Id.* at 522. *See also Ellis v. Brotherhood of Ry., Airline & Steamship Clerks*, 466 U.S. 435, 447 (1984) ("Employees could be required to become 'members' of the union, but those who objected could not be burdened with any part of the union's expenditures in support of political or ideological causes.") If bargaining unit workers are allowed to resist subsidizing the causes sponsored by their union leadership, whom they elect, then it is all the more necessary that property owners and their tenants be allowed to resist the speech demands of uninvited groups over which they have no electoral influence.

This rejection of a compelled subsidy is not confined to the labor union cases. In *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1 (1986), the Court vacated a state regulatory order that forced a public utility to carry clearly marked messages of its political opponents in its billing envelopes even though the utility did not incur any additional out-of-pocket costs to comply with the regulation. The Court rejected the speech subsidy, which, as in the present case, was not in cash, but in kind. Then-Justice Rehnquist dissented in the *Pacific Gas & Electric* case based on his "belie[f] that the right of access [in *Pacific Gas & Electric* was] constitutionally indistinguishable from the right of access approved in *PruneYard*." *Id.* at 26 (Rehnquist, J., dissenting). And so it is. If the First Amendment forbids forcing individuals to promote the message of others when there is no direct cost to them, then, a fortiori, the First Amendment must also forbid forcing persons to subsidize the speech of others when it comes at a clear economic cost.

The state supreme court assumes that reasonable regulations imposed by the property owner will negate the subsidy. This assumption, however, naively ignores the court's corollary assertion that, in regulating political speech, the malls may only impose restrictions concerning the time, place, and manner of the speech without consideration of the content of the message. While such a limitation is consistent with the obligation imposed on a governmental actor, *see Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647-48 (1981), the petitioner is not a governmental actor.

There is a categorical distinction between the obligation of the state in its use and management of its public property and the obligation of a shopping center owner in the use and management of its private facilities. The prohibition against viewpoint discrimination applies only to avoid governmental endorsement. In the private setting, the First Amendment allows a private citizen to support one candidate without incurring the obligation to allow equal access to the candidate's rival, just as the owner may make a campaign contribution to that candidate without being obliged to support his or her opponent. In light of the

owner's right to select and promote those viewpoints with which it agrees, it should be clear that the ability (and the obligation) to impose content-neutral regulations does not protect the petitioner's First Amendment rights.

Treating the petitioner as a governmental actor exacts other costs, as well. When the state is involved, the mere threat of violence is not enough to deny free speech rights, for the state has the ability and the obligation, despite the financial burden, to protect the unpopular speaker from violence. *See, e.g., Collin v. Smith*, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978) (invalidating Skokie, Illinois, ordinances that had placed restrictions on the Nazis' planned controversial march with swastikas in a Jewish neighborhood). Will the same rule apply to a shopping center, which does not have a municipally-paid and trained police force? Will the petitioner have to permit, along with the pro and anti-war, abortion, and tax factions, to name a few, members of the American Nazi Party and the Ku Klux Klan to appear in "uniform?" Will opposing groups also have a right to be present at the same time to attempt to counter each other's effort with the "relevant audience?"

The often-cited experience reported in *Cologne v. Westfarms Associates*, 192 Conn. 48, 469 A.2d 1201 (1984), is illustrative of the problems that arise when private citizens are forced to create and regulate a forum for political speech. In that case, the Ku Klux Klan sought to take advantage of a prior decision of the superior court that had granted the National Organization for Women access for expressive purposes to the Westfarms Mall located in West Hartford, Connecticut. Anti-Klan groups arrived at the mall to protest and demonstrate against the *mall's* granting access to the Klan, resulting in injury to persons, considerable financial damage and disruption to businesses, and a major disturbance that was not quelled until the West Hartford and New Britain SWAT teams, in full riot gear together with police dogs, arrived on the scene and sealed off several of the mall's entrances. Not surprisingly, the demonstration had a devastating effect on the mall's tenants, as sales declined by 35 percent.

(Prutaub, JMB's App. (App. Div.) 161-67.) As the superior court later explained in modifying its prior injunctive order:

> Several persons were injured, there was considerable financial loss and disruption to business tenants of the defendants, not only during the demonstration but during the entire day as demonstrated by comparative income figures offered through witnesses for the defendants. Additionally, customers of G. Fox & Co. were treated to the spectacle of police in full riot gear together with at least one police dog removing one of the demonstrators across the sales floor. The main entrance doors to the G. Fox sales premises were locked during the period of the confrontation which was in excess of an hour thus eliminating a major exit route to persons inside the premises should the need arise. Police witnesses expressed the opinion that had this confrontation occurred inside the mall the results would be uncontrollable and disastrous in terms of potential physical injury to police, customers and tenants and their employees as well as damage to property.

*Cologne v. Westfarms Assocs.,* No. 274171, slip op. (Conn. Super. Ct. Aug. 13, 1983) at 3-4, *modifying* No. 274171, slip op. (Conn. Super. Ct. Feb. 28, 1983), *rev'd,* 192 Conn. 48, 469 A.2d 1201 (1984). The Supreme Court of Connecticut subsequently reversed the original judgment that had granted entry to NOW. *Cologne,* 192 Conn. 48, 469 A.2d 1201.

When dealing with a private person and not a governmental entity, time, place, and manner regulations do not offer a solution to compelled subsidization. The assertion that regulations will resolve the problem deliberately ignores the very facts which make the described incident pertinent. In the *Cologne* case, the disturbance was not caused by the group seeking access (the Ku Klux Klan), it was caused by political demonstrators who opposed the presence of the Ku Klux Klan and believed they had a "constitutional right" to demonstrate their opposition at the same place and time and to the same audience as the Ku Klux Klan. In other words, no amount of regulation could have forestalled the problem caused by the injection of this politically inflammatory

issue into the otherwise neutral environment of the mall. Rather, it took SWAT teams from two counties to restore order.

The mall owner and its tenants, not the government, pay for the resulting costs, not only from the stores being overrun and closed, but from the undeniably negative publicity that forces the mall's association with the group, and with the event itself. Under the Constitution, the government, not select private citizens, should bear these subsidization costs.

In the end, it all comes down to the same principle: a state may not require a person "to contribute to the support of an ideological cause he may oppose." *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235 (1977). Yet, if access is mandated by the state court, the petitioner and the tenants, who pay for the mall areas so attractive to the Coalition (and who are themselves not permitted to solicit patronage there), will be forced to subsidize the Coalition's political activities. And forcing the petitioner to supply a forum - indeed, a safe, secure, insured, heated, and air-conditioned forum - for causes it finds objectionable is a forced subsidization in violation of the First Amendment.

## II. THE STATE SUPREME COURT TAKES THE PRIVATE PROPERTY OF THE MALL AT SHORT HILLS FOR THE USE OF THE COALITION WITHOUT JUST COMPENSATION IN VIOLATION OF THE FIFTH AMENDMENT

The Supreme Court of New Jersey "believe[s]" that the state right of freedom of speech "is fundamentally more important than" private property rights, *New Jersey Coalition*, 138 N.J. at 371, 650 A.2d at 780, and, therefore, the court ignores any "*negative* effect on [the mall owners'] enterprises" as "an unavoidable consequence of their own activities." *Id.* at 372, 650 A.2d at 780. The Takings Clause, U.S. Const. amend. V, along with the Supremacy Clause, U.S. Const. art. VI, cl. 2, however, does not allow such a preemptory dismissal of property rights. Nor does *PruneYard* grant a license to lump every "regional shopping center" into a single basket, subject to the

state court's command, without any consideration of the value and use of the particular property.

It is true that not every governmental injury to property is an unconstitutional "taking." Rather, that determination requires an inquiry into "the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations." *PruneYard*, 447 U.S. at 83 (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979)). Unlike in *PruneYard*, the evidence in this case "demonstrate[s] that the 'right to exclude' " political activity "is so essential to the use or economic value of [the shopping center] that the state-authorized limitation of it amount[s] to a 'taking.' " *Id.* at 84. One cannot visit The Mall at Short Hills and not come away with the inexorable conclusion that nowhere in this mall may a political action group engage in canvassing activities without interfering with the unique architectural design and the purposeful environment created there.

That which may be of little moment to the unpracticed eye of an outsider is critical to preserving the elegant atmosphere of an upscale fashion center such as The Mall at Short Hills. The owner's goal is to encourage the circulation of shoppers *through* the common areas and *into* the stores; the systematic effort is to create an environment in which the common areas are subdued so that the customers have a direct and unimpeded visual engagement with as many separate storefronts as possible.

Every detail in the planning, design, and construction of the mall was a carefully considered economic decision backed by private investment. Design, tenant mix, and demographics are all combined to make The Mall at Short Hills a magnet for high-end retailers and their customers. Everything is conceived and organized in minute detail to be part of an harmonious whole: what type of tenant will be placed in which location (e.g., Gucci in the center court area), the design and composition of the flooring (cushioned marble), the use of lighting (skylights and spotlights), the types and locations of accessways between levels, the form and function of the architecture (e.g., no structural columns, glass railings), the selection and placement of internal landmarks.

Architectural presentation such as columns and colors, which may appear to be of little importance to the untrained observer, is critical for setting the mood that induces commercial activity. Every stage in the development is done with the view of the maximization of sales and the return on the owner's investment.

In *Dolan v. City of Tigard*, 114 S.Ct. 2309 (1994), Chief Justice Rehnquist distinguished *PruneYard* on the basis that "the shopping center 'may restrict expressive activity by adopting time, place, and manner regulations that will minimize any interference with its commercial functions.' " *Id.* at 2321 (quoting *PruneYard*, 447 U.S. at 83). But the "right" to regulate the time, place, and manner of political leafleters, as if the owner were a governmental entity regulating a public forum, is illusory. As a private property owner, the petitioner previously had the absolute right to exclude those who exceeded the scope of its invitation to shop. Would the taking in *Dolan* have been any less a taking had the city allowed Mrs. Dolan to limit the use of the proposed pathway to one day each weekend, between the hours of 1:00 and 5:00 o'clock in the afternoon?[17] The only true distinction between *Dolan* and *New Jersey Coalition* is that the City of Tigard sought to control an undeveloped and previously-unused piece of land at the back of the owner's property line, while in the present case, the New Jersey court imposes state control over the core (and most valuable) portion of the petitioner's property.

It must also be recognized that the time, place, and manner of political canvassing is actually set by the state supreme court, not by the petitioner. The *manner* is specifically dictated by the court - leafleting, voice contact with passersby, and a sign, *New Jersey Coalition,* 138 N.J. at 378, 650 A.2d at 783 - and the *time* and *place* of exercising free speech are controlled by what is "necessary to convey the message," *id.* at 378, 650 A.2d at 783,

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[17]In addition, put to the choice between the surrender of an inessential portion of her land and the required toleration of leafleters inside her plumbing store, albeit subject to her "reasonable" time, place, and manner regulations, is there really any question that Mrs. Dolan would have preferred the former to the latter: why then should the Fifth Amendment protect only the interest that she values less?

rather than by what will protect the petitioner and the tenants. By definition, the petitioner cannot adopt regulations to protect itself and the tenants from the most prevalent harm - the interception of passersby in the corridors while they travel from store to store and the diversion of their attention.[18] The shoppers' undivided time and focus are the very essence of the petitioner's substantial investment-backed expectation. The economic impact of this intrusion is reflected in the Gallup research introduced by the petitioner: 33 percent of the patrons would avoid the group, as well as the stores in the area of the group, and 41 percent would shop less at a mall with such activity.

The "right" to regulate actually imposes on the petitioner a quasi-governmental duty, with none of the governmental protections that would be present if the state actually took over the property. For example, on public property, the state has the obligation to provide police protection for the unwanted speaker and the audience. Now the petitioner must bear the cost of providing security. And what about the increased risk of injury, to speaker or shopper, either by accident or by instigation? On state-owned property, there is governmental immunity; on private property, the petitioner must buy liability insurance.[19] These are " 'public burdens which, in all fairness and justice, should be borne by the public as a whole,' " not by the petitioner and the

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[18]Implicit in the New Jersey court's rationale is the argument that, so long as an invitation has been extended to so many, the costs to the mall of admitting still other persons are too small to bother with. But that argument has it precisely backwards. It is exactly because so many people are present at the mall that the owner is so insistent on controlling the activities in the mall and guarding the right to exclude politicking. When unwelcome groups enter the mall, the evidence is that they will reduce the number of visitors to the mall, shorten the visitors' length of stay, and substantially cut their level of purchases, as the Gallup survey so clearly shows. The *more* people who are present at the mall, the *more* critical it is to curtail inconsistent activities in the mall, and the *more* important to restrict access.

[19]Although the Supreme Court of New Jersey acknowledges the concern "not just for business, but for the safety and security of people at the premises," it dismisses these concerns as hardly "novel," having been dealt with successfully by this country, its cities, and its downtown business districts. *New Jersey Coalition*, 138 N.J. at 376, 650 A.2d at 782. What the court ignores, however, is that those places are public property, and the cost of safety, security, and losses is borne by all of the people, not a select few.

tenants. *PruneYard*, 447 U.S. at 83 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

Likewise, it is of no consequence that the intrusions may be intermittent instead of constant.[20] The New Jersey court has dedicated a *permanent* easement through The Mall at Short Hills. While a particular leafleter will not occupy The Mall at Short Hills continuously, just as no member of the public in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), was going to occupy the beachfront continuously, under the New Jersey court decision, "individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises." *Nollan*, 483 U.S. at 832. Squatting and repeated entry are both deliberate trespasses, notwithstanding the differences in location, frequency, and duration. It makes no sense as a matter of constitutional law to erect a categorical distinction between different kinds of trespasses, in a manner that is wholly inconsistent with the traditional understandings of the common law. *See Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886 (1992). The " 'right to exclude,' so universally held to be a fundamental element of the property right," plainly includes protection from government-imposed easements. *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979).

Stitched together, a ready procession of discrete, temporary occupations is little different, and more costly, than the permanent physical occupation proscribed in both *Nollan* and *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). In fact, an easement in the common areas of The Mall at Short Hills imposes far greater costs on the owner than a pathway at the rear of its lot or the outright confiscation of a small area on the mall's roof for the placement of an antenna (as in *Loretto*). Indeed, the devaluation of the areas of the petitioner's private property by the

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[20]Both *Nollan v. California Coastal Commission*, 483 U.S. 825, 832 n.1 (1987), and *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434 (1982), distinguished *PruneYard* on the basis that the *PruneYard* invasion was temporary, while *Nollan* and *Loretto* each involved a permanent occupation.

New Jersey court is revealed by the rental that the petitioner has already eschewed from disparate uses. For example, the petitioner does not accept sums up to $500,000 per year for the erection of individual kiosks in the center of the mall because the decline in aesthetic appearance and the obstruction of visual sight lines will cost that amount and more in sales that could be derived from the leased stores.

In sum, the Supreme Court of New Jersey may believe that the collectivization of private property to preserve free speech is a good idea, but that does not mean that the owner of The Mall at Short Hills alone can be compelled to contribute to this realization. Rather, New Jersey is free to advance its wish of turning a portion of the common areas of the mall into city streets for the use of political and societal speakers by using its power of eminent domain for this "public purpose." But, as the Court said in *Nollan*, 483 U.S. at 842, "if [the state] wants an easement across the [mall] property, it must pay for it."

## CONCLUSION

The petition for a writ of certiorari should be granted.

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May 1995

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1994

SHORT HILLS ASSOCIATES, f.k.a.
Prutaub Joint Venture, *Petitioner,*

*v.*

NEW JERSEY COALITION AGAINST WAR IN THE MIDDLE EAST, SYLVIA ACKELSBERG, and DAVID CLINE, *et al., Respondents.*

**On Petition for a Writ of Certiorari to the Supreme Court of New Jersey**

## APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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SUPREME COURT OF NEW JERSEY
A-124/125 September Term 1993

NEW JERSEY COALITION
AGAINST WAR IN THE MIDDLE
EAST, SYLVIA ACKELSBERG, and
DAVID CLINE,
Plaintiffs-Appellants
and Cross-Respondents,

v.

J.M.B. REALTY CORPORATION,
d/b/a Riverside Square,
PRUTAUB JOINT VENTURE,
d/b/a The Mall at Short Hills,
Defendants-Respondents
and Cross-Appellants,

and

CHERRY HILL CENTER, INC.,
d/b/a Cherry Hill Mall,
KRAVCO, INC.,
d/b/a Hamilton Mall,
EQUITY PROPERTIES & DEVELOPMENT CO., INC.,
d/b/a Monmouth Mall,
KRAVCO, INC.,
d/b/a Quakerbridge Mall,
ROCKAWAY CENTER ASSOCIATES,
d/b/a Rockaway Townsquare,
WOODBRIDGE CENTER, INC.,
d/b/a Woodbridge Center,
LIVINGSTON MALL VENTURE,
d/b/a Livingston Mall,
HARTZ MOUNTAIN INDUSTRIES, INC.,
d/b/a The Mall at Mill Creek,
Defendants-Respondents.

Argued March 14, 1994 -- Decided December 20, 1994

On certification to the Superior Court, Appellate Division, whose opinion is reported at 266 N.J. Super. 159 (1993).

Frank Askin and William J. Volonte, on behalf of the American Civil Liberties Union Foundation, argued the cause for appellants and cross-respondents (Mr. Askin, Howard Moskowitz, and Mr. Volonte, attorneys.

Joseph Aviv, a member of the Michigan bar, argued the cause for respondents and cross-appellants (Cuyler, Burk & Matthews, Attorneys; Mr. Aviv, Jo Ann Burk, Peter Petrou, and Bruce L. Segal, a member of the Michigan bar, on the brief).

Nicholas deB. Katzenbach argued the cause for respondents Cherry Hill Center, Inc., d/b/a Cherry Hill Mall and Woodbridge Center, Inc., d/b/a Woodbridge Center (Riker, Danzig, Scherer, Hyland & Perretti, attorneys; Anne M. Patterson, on the brief).

Ronald E. Wiss argued the cause for respondents Rockaway Center Associates, d/b/a Rockaway Townsquare and Livingston Mall Venture, d/b/a Livingston Mall (Wolff & Samson, attorneys; Mr. Wiss and Sandra Nachshen, on the brief).

Brian J. McMahon argued the cause for respondents Kravco, Inc., d/b/a Hamilton Mall, Kravco, Inc., d/b/a Quakerbridge Mall (Crummy, Del Deo, Dolan, Griffinger & Vecchione, attorneys).

Mark A. Steinberg submitted a letter in lieu of brief on behalf of respondent Equity Properties and Development Co., Inc., d/b/a Monmouth Mall.

Curtis L. Michael submitted a letter brief on behalf of respondent Hartz Mountain Industries, Inc., d/b/a The Mall at Mill Creek (Horowitz, Rubino & Associates, attorneys).

Bernard A. Kuttner submitted a brief on behalf of amici curiae, United Farm Workers of America, AFL-CIO, and New Jersey Consumer Coalition.

The opinion of the Court was delivered by WILENTZ, C.J.

The question in this case is whether the defendant regional and community shopping centers must permit leafletting on societal issues. We hold that they must, subject to reasonable conditions set by them. Our ruling is limited to leafletting at such centers, and it applies nowhere else.[1] It is based on our citizens' right of free speech embodied in our State Constitution. N.J. Const. art. I, ¶¶6, 18. It follows the course we set in our decision in State v. Schmid, 84 N.J. 535 (1980).

In Schmid we ruled that our State Constitution conferred on our citizens an affirmative right of free speech that was protected not only from governmental restraint -- the extent of First Amendment protection -- but from the restraint of private property owners as well. We noted that those state constitutional protections are "available against unreasonably restrictive or oppressive conduct on the part of private entities that have otherwise assumed a constitutional obligation not to abridge the individual exercise of such freedoms because of the public use of their property." Id. at 560. And we set forth the standard to determine what public use will give rise to that constitutional obligation. The standard takes into account the normal use of the property, the extent and nature of the public's invitation to use it, and the purpose of the expressional activity in relation to both its private and public use. This "multi-faceted" standard determines whether private property owners "may be required to permit, subject to suitable restrictions, the reasonable exercise by individuals of the constitutional freedoms of speech and assembly." Id. at 563. That is to say, they determine whether, taken together, the normal uses of the property, the extent of the public's invitation, and the purpose of free speech in relation to the property's use result in a suitability for free speech on the property that on balance, is sufficiently compelling to warrant limiting the private

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[1]As noted and explained infra at __ (slip op. at 64-66), our ruling applies to all regional shopping centers. We do not decide if it applies to all community shopping centers.

property owner's right to exclude it; a suitability so compelling as to be constitutionally required.

Applying Schmid, we find the existence of the constitutional obligation to allow free speech at these regional and community shopping centers clear. Although the ultimate purpose of these shopping centers is commercial, their normal use is all-embracing, almost without limit, projecting a community image, serving as their own communities, encompassing practically all aspects of a downtown business district, including expressive uses and community events. We know of no private property that more closely resembles public property. The public's invitation to use the property -- the second factor of the standard -- is correspondingly broad, its all-inclusive scope suggested by the very few restrictions on the invitation that are claimed, but not advertised, by defendants. For the ordinary citizen it is not just an invitation to shop, but to do whatever one would do downtown, including doing very little of anything.

As for the third factor of the standard -- the relationship between the purposes of the expressional activity and the use of the property -- the free speech sought to be exercised, plaintiff's leafletting, is wholly consonant with the use of these properties. Conversely, the right sought is no more discordant with defendants' uses of their property than is the leafletting that has been exercised for centuries within downtown business districts discordant with their use. Furthermore, it is just as consonant with the centers' use as other uses permitted there. Indeed, four of these centers actually permitted plaintiff's leafletting (although it took place in only two of those).

We therefore find the existence of a constitutional obligation to permit the leafletting plaintiff seeks at these regional and community shopping centers; we find that the balance of factors clearly predominates in favor of that obligation; its denial in this case is unreasonably restrictive and oppressive of free speech: were it extended to all regional and community shopping centers, it would block a channel of free speech that could reach hundreds of thousands of people, carrying societal messages that are at its very core. The true dimensions of that denial of this constitutional

obligation are apparent only when it is understood that the former channel to these people through the downtown business districts has been severely diminished, and that this channel is its practical substitute.

We hold that Schmid requires that the free speech sought by the plaintiff -- the non-commerical leafletting and its normal accompanying speech (without megaphone, soapbox, speeches, or demonstrations) -- be permitted by defendants subject to such reasonable rules and regulations as may be imposed by them. This free speech can be, and we have no doubt will be, carefully controlled by these centers. There will be no pursuit or harassment of shoppers. Given this limited free speech right -- leafletting, given the centers' broad power to regulate it, and given experience elsewhere, we are confident that it is consonant with the commercial purposes of the centers and the varied purposes of their shoppers and non-shoppers.

We recognize the concerns of the defendants, including their concern that they will be hurt. Those concerns bear on the extent and exercise of the constitutional right and we have addressed them in this opinion. We recognize the depth and legitimacy of those concerns even apart from their constitutional relevance. Defendants have expended enormous efforts and funds in bringing about the success of these centers. We hope they recognize the legitimacy of the constitutional concern that in the process of creating new downtown business districts, they will have seriously diminished the value of free speech if it can be shut off at their centers. Their commercial success has been striking but with that success goes a constitutional responsibility.

Without doubt, despite the fact that the speech permitted -- leafletting -- is the least obtrusive and the easiest to regulate, and despite the centers' broad power to regulate, some people will not like it, any more perhaps than they liked free speech at the downtown business districts. Dislike for free speech, however, has never been the determinant of its protection or its benefit. We live with it, we permit it, as we have for more than two hundred years. It is free speech, it is constitutionally protected; it is part of this State, and so are these centers.

I.

In the summer and fall of 1990 our government and our country were debating what action, if any, should be taken in response to Iraq's invasion of Kuwait. The issue eclipsed all others. The primary competing policies were military intervention and economic sanctions. On November 8, President Bush announced a major increase in the number of troops stationed in Saudi Arabia and the Persian Gulf in order to provide "an adequate offensive military option." President's News Conference, 26 Weekly Comp. Pres. Doc. 1789, 1792 (Nov. 8, 1990). Plaintiff -- a coalition of numerous groups[2] -- opposed military intervention and sought public support for its views. For that purpose, plaintiff decided to conduct a massive leafletting campaign on November 9 and November 10, urging the public to contact Congress to persuade Senators and Representatives to vote against military intervention. The November 9 effort was aimed at commuter stops around the State.[3] The November 10

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[2]The Coalition is comprised of several dozen political and religious groups with related but not identical political agendas. There are over 25,000 individual members, including the following groups: New Jersey SANE/FREEZE, New Jersey Citizen Action, Monmouth County Pax Christi, New Jersey Council of Churches, the New Jersey Rainbow Coalition, the Baptist Peace Fellowship, the Coalition for Nuclear Disarmament, Vietnam Veterans Against the War, Drew University Peacemakers, the Monmouth County Coalition for the Homeless, the Jersey Cape Coalition for Peace and Justice, the New Jersey Peace Mission, the New Jersey Pledge of Resistance, the South Jersey Campaign for Peace and Justice and the Women's International League for Peace and Freedom.

The Coalition established the following four objectives: 1) to prevent United States military intervention in the Persian Gulf, 2) to prevent the establishment of a United States base in the Middle East, 3) to obtain a peaceful solution to the Persian Gulf crisis by an international agency and 4) to divert the expenditure of United States tax dollars from defense spending to domestic spending. It sought to achieve these objectives by, among other things, distributing educational literature and obtaining signatures on petitions and sending them to public officials.

[3]According to plaintiff's November 9, 1990 press release, their materials were distributed in at least 30 locations including Journal Square in Jersey City, Newark Penn Station, Camden City Hall, the Lewes Ferry in Cape May, the Hoboken PATH station and locations in Atlantic City, New Brunswick,

targets were shopping centers, the ten very large regional and community shopping centers whose owners are the defendants herein.

On November 9, plaintiff -- aware of the shopping centers' probable refusal -- sought judicial relief ordering the centers to permit the leafletting. That effort was unsuccessful. The trial court ruled that plaintiff had failed to prove refusal; appellate review was also unsuccessful.

On November 10 plaintiff's members and representatives went to the malls and requested permission to leaflet. Four of the defendant malls granted plaintiff permission to leaflet on their premises, and plaintiff did in fact leaflet at two of those malls. Monmouth Mall initially denied plaintiff's request, but later issued plaintiff a permit to use its community booth for two days in January, and even provided professional signs and displays for the group. Plaintiff used the booth on those days. The conditions imposed by mall management, however, made it difficult for plaintiff to reach the public. Among other restrictions, plaintiff was not allowed to approach passersby to offer them literature. The Mall at Mill Creek, Cherry Hill Mall, and Woodbridge Center granted plaintiff permission to use their community booths, but required that plaintiff obtain or show proof of liability insurance in the amounts of $1,000,000 for bodily injury and $50,000 to $1,000,000 for property damage. Plaintiff was unable to obtain the necessary insurance, and requested that the malls waive the requirement. Woodbridge Center waived the insurance requirements, allowing plaintiff to distribute leaflets from a table, while The Mall at Mill Creek and Cherry Hill Mall refused.

Although the six remaining malls refused permission, one of those malls -- Hamilton -- ultimately allowed plaintiff to leaflet. While it initially denied permission, asking plaintiff to leave the

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Wrightstown, Princeton, Trenton, Woodbridge, Edison, Rockaway, Bernardsville, Montclair, South Orange, Maplewood, Englewood, Fort Lee, Rutherford, Glen Rock, New Providence, Plainfield, Cranford, Westfield, Haddonfield, Collingswood, Red Bank, Long Branch, and Middletown. Plaintiff's representatives also distributed leaflets at the Port Authority Bus Terminal in New York and Market Street Station in Philadelphia.

premises, it eventually allowed plaintiff to leaflet undisturbed for approximately three to four hours.

As a consequence of defendants' refusal to allow plaintiff access to the malls, and the restrictions imposed on such access where allowed, few of the thousands of people at those malls on November 10 learned of plaintiff's views.

Plaintiff again sought emergent judicial relief ordering the centers to permit its members to leaflet in support of their view that those forces already deployed refrain from any military action. Relief was again denied, both at the trial and appellate level. Plenary trial of the substantive issue of plaintiff's right to leaflet on defendants' premises was thereafter held, but by then the military intervention had occurred and the engagement was over.[4]

Each of the ten defendant shopping centers is very large. For instance, one defendant mall, Woodbridge Center, serves an area with a population of 1,400,000. On an average day in 1990, approximately 28,750 people shopped there. November 10, 1990, however, was not an average day. Not only was the tenth a Saturday, a day that is generally very busy for shopping malls, but it was also part of Veterans' Day weekend. Thus, presumably many more people visited malls on that day than on an average day. Indeed, plaintiff's witnesses testified that they sought to leaflet on that day because of the large expected turnout of shoppers during the holiday weekend.

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[4]Congress had voted in January 1991 to authorize the President to use armed force to repel the Iraqi aggression in Kuwait. S.J. Res. 2, 102d Cong., 2d Sess. (1991); H.J. Res. 77, 102d Cong., 2d Sess. (1991). The Senate narrowly approved the joint resolution by a vote of fifty-two to forty-seven. 137 Cong. Rec. S403 (daily ed. Jan. 12, 1991). The resolution's margin of success in the House of Representatives was 250 to 183. 137 Cong. Rec. H485 (daily ed. Jan. 12, 1991).

Nine of the defendant shopping centers are "regional centers." A regional shopping center is defined in the industry as one that

> provides shopping goods, general merchandise, apparel, furniture and home furnishings in full depth and variety. It is built around the full-line department store, with a minimum GLA [gross leasable area[5]] of 100,000 square feet, as the major drawing power. For even greater comparative shopping, two, three or more department stores may be included. In theory a regional center has a GLA of 400,000 square feet, and can range from 300,000 to more than 1,000,000 square feet.
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> [National Research Bureau, Shopping Center Directory 1994, Eastern Volume (1993).]

The regional centers involved in this case have from 93 to 244 tenants, including not only department stores, but also restaurants and other retail and business establishments, such as art galleries, automotive centers and gas stations, banks, brokerage houses and finance companies, leisure and entertainment centers, optical centers, travel agencies, hair salons, shoe repair shops, theaters, ticket agents, insurance agencies, doctors' offices, and a United States postal booth during the holiday seasons. One housed a United States Post Office substation until approximately 1990. Each mall is surrounded by parking facilities that hold from 3,075 to 9,000 vehicles. The acreage of the regional centers ranges from 31.44 to 238 acres.

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[5]Gross Leasable Area refers to "the total floor area designed for tenant occupancy and exclusive use .... GLA is the area for which tenants pay rent." National Research Bureau, 1991 Directory of Shopping Centers in the United States, Eastern Volume (1990).

The tenth defendant is a "community" shopping center. A community center is smaller than a regional center and lacks the variety of merchandise available at a regional mall. The industry defines a community center as one that includes

> a wide[ ] range of facilities for the sale of soft lines (apparel) and hard lines (hardware, appliances, etc.) .... It is built around a junior department store, variety store or discount department store although it may have a strong specialty store. The typical size of a community center is 150,000 square feet. In practice a community center can range from 100,000 to 300,000 square feet.
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> [Ibid.]

The only community center involved in this case, the Mall at Mill Creek, covers twenty-seven acres. It has a discount department store, a supermarket, sixty-two smaller retail stores, and a seven-restaurant food court.

All of the defendant shopping centers are enclosed malls -- enclosures covering not only the tenants of all kinds but also substantial common areas linking them and providing space for people to congregate. In those malls where plaintiff was refused permission to leaflet, the refusal was absolute; plaintiff was denied access to the enclosed areas as well as the parking lots and sidewalks outside of the enclosures.

Although each mall asserts that it does not resemble a downtown business district, like those districts, each of these malls employs or uses part-time (or in some cases, on-duty) municipal police officers, usually in uniform and armed. Quakerbridge Mall houses a municipal police substation. Police officers, almost always off-duty, patrol the inside of Cherry Hill Mall, Woodbridge Center, Livingston Mall, and the Mall at Short Hills. The interiors of Rockaway Townsquare Mall and Monmouth Mall are patrolled by on-duty municipal police officers. Some of the malls (such as Riverside and Monmouth) hire off-duty police

officers for traffic control when necessary. Most of the malls' parking lots are patrolled by municipal police officers.

Each of the defendants permits and encourages a variety of non-shopping activities on its premises.[6] Six of the malls provide access to community groups. Riverside Square Mall has a meeting room, with an occupancy of 150 persons, that is available to the public. Monmouth Mall rents a civic auditorium to various organizations. Monmouth Mall also has a community booth from which various groups are allowed to espouse their causes, distributing leaflets and literature to passersby. Hamilton, the Mall at Mill Creek, Cherry Hill Mall, and Woodbridge Center provide similar community booths.

Some of the non-shopping activities permitted by defendants involved speech, politics, and community issues. Some of these activities, moreover, have been permitted by the very defendants who denied plaintiff permission to leaflet. For example, Rockaway Townsquare Mall held a Crime Prevention Day, has hosted community weekends, and allowed one of plaintiff's constituent members, Morris County SANE/FREEZE, to participate. Livingston Mall also has sponsored community weekends where civic groups were allowed to position themselves in the common area of the mall, distribute literature and speak about issues relevant to their causes, and Quakerbridge has hosted a similar community day.

In addition to sponsoring community weekends or days, these malls have sponsored other events that included political speech or concerned issues of civic importance. Livingston Mall allowed a voter registration drive to be conducted by the League of Women Voters, and sponsored a Child ID Day with the Livingston Police. Rockaway Townsquare Mall sponsored a voter registration drive in conjunction with the Morris County Republican party, and a United Way Day of Caring where sixty-seven agencies distributed information on diverse topics, such as substance

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[6]The myriad of uses permitted at the malls defies description. In the appendix to this opinion, which reproduces Appendix B of the trial court's opinion, we have listed these uses.

abuse, homelessness, hunger, literacy, and youth counselling. Local officials and dignitaries participated in the "kick-off" for that event. Quakerbridge Mall hosted an exhibition of local municipal groups with the Mall's Merchants Association and Lawrence Township.

The remaining malls have permitted similar events. For example, Cherry Hill Mall allowed Senator Bill Bradley's office to conduct a voter registration drive in the fall of 1990. Woodbridge Center allowed Senator Bradley to walk through its mall greeting and shaking hands with its patrons in the summer of 1990 when he was running for re-election. Both Cherry Hill Mall and Woodbridge Center allowed the Marines to sponsor "Toys for Tots" drives. Woodbridge Center's press release stressed that the focus of the event would be on children whose mothers or fathers were serving in the Persian Gulf. The Mall at Mill Creek allowed the New Jersey Prosecutor's Victim and Witness Association to present information for crime victims, allowed a Bradley for United States Senate Voter Registration Drive to be held, and allowed military recruitment by the United States Naval Sea Cadets and the United States Army.

Monmouth Mall sponsored a Spring Community Fair, held a Berlin Wall Exhibit, allowed free "Video Postcards From Home" to the Persian Gulf troops to be taped on its premises, and has a senior citizen activity network office. Riverside Square Mall allowed Senator Bradley's office to conduct a non-partisan voter registration drive. Riverside Square also sponsored a United States Marine Corps "Toys for Tots" drive, a Bergen County Read-In Festival, which involved the participation of local officials, and an Earth Day Celebration with local and national environmental organizations. Hamilton Mall hosted a Coastal Cops Celebration Holiday. This program, which is coordinated by the mall and local businesses, gives children ages six to twelve the opportunity to participate in a clean-up effort of the area's beaches.

Furthermore, based on statements at oral argument (and on our own experience) we deem it likely that defendants permit candidates, accompanied as always by a few aides, to seek support

by walking through the mall, approaching shoppers, offering a handshake, and saying a few words (or more) to each. We would be surprised if those aides did not have leaflets available.

Despite the myriad of permitted uses, including many involving the distribution of issue-oriented literature -- leaflets -- and accompanying speech, despite the explicit permission given to plaintiff to leaflet at four of them, and despite the display of tenants' posters at most of them, posters that were visible from the common areas and expressed support for our armed forces in the Persian Gulf, all of the centers claim to prohibit issue-oriented speech and leafletting.

Defendants presented evidence that issue-oriented free speech, and especially controversial free speech, conflicted with their commercial purpose: that purpose is to get as many shoppers as possible on the premises and to provide an atmosphere that would encourage buying. Leafletting, speaking, and the assumed related consequences of such actions, were described as in conflict with shopping, particularly impulse buying, a major goal of such centers. If designed to prove probable financial loss, the evidence was unpersuasive. At malls of this size, carefully regulated leafletting, limited in duration and frequency, and permitted only in selected areas, seems unlikely to have the slightest impact on actual revenues, even if some shoppers dislike it. At most the impact would be negligible. Despite plaintiff's assertion that California's shopping centers, where leafletting has been permitted since 1979, have suffered no adverse financial consequences whatsoever, defendants suggested nothing concrete to the contrary.[7] And the same is true of Bergen Mall, apparently a regional shopping center, where issue-oriented leafletting has been permitted

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[7]Defendants presented the affidavit of the general manager of Sunvalley Mall in Concord, California. While noting that in 1990 the mall issued 266 permits for expressive activities on its premises, he provided only one example of disruption: a group of seventy activists handed out condoms in the mall. There is no mention, however, of any financial harm as a result of that incident. Defendants could clearly prohibit such conduct by virtue of their power to regulate leafletting activities.

since 1984 by virtue of a trial court injunction (and where plaintiff leafletted against our Persian Gulf military involvement).

At the plenary trial, plaintiff sought a permanent injunction restraining defendants from preventing or interfering with plaintiff's free speech activities, subject to reasonable conditions. It claimed this substantive right to free speech under New Jersey's Constitution as well as at common law. No claim of right was made under the Federal Constitution. Plaintiff also challenged specific regulations imposed by some of the malls including: 1) content-based regulations prohibiting offensive speech, 2) requirements that the group seeking access to the mall obtain insurance, 3) regulations prohibiting people engaging in expressive activity from approaching mall visitors and 4) arbitrary limitations on mall access.

The trial court entered judgment in favor of defendants, denying all relief, on the ground that defendants' property was dedicated solely to commercial uses inconsistent with political speech; that the invitation to the general public was limited to such use; and that, therefore, under our ruling in State v. Schmid, 84 N.J. 535 (1980), no State constitutional right of free speech on defendants' premises existed. New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp., 266 N.J. Super. 195 (Ch. Div. 1993). The trial court ruled, in effect, that defendants retained the right to exclude those not invited to its premises to the same extent as any other private property owner. Given that judgment, the trial court found it unnecessary to rule on defendants' contention that the relief sought by plaintiff, if granted, would constitute a taking of their property without just compensation, would deprive them of their property without due process of law, and would abridge their freedom of speech by forcing them to provide a forum for the speech of others, all in violation of the Federal and State Constitutions. The Appellate Division affirmed, relying substantially on the trial court's findings and opinion. 266 N.J. Super. 159 (1993).

We granted both plaintiff's petition for certification and cross-petitions filed by two of the defendants. 134 N.J. 564 (1993). We reverse, and declare that plaintiff has a State constitutional right to

leaflet at defendants' shopping centers, subject to reasonable conditions, and that such right does not infringe on any constitutional right asserted by defendants.

## II.

Before reaching our discussion of the law, we must first examine the background against which this question is raised. We know its most important outline. Regional and community shopping centers significantly compete with and have in fact significantly displaced downtown business districts as the gathering point of citizens, both here in New Jersey and across America.

Statistical evidence tells the story of the growth of shopping malls. In 1950, privately-owned shopping centers of any size numbered fewer than 100 across the country. Steven J. Eagle, Shopping Center Control; The Developer Besieged, 51 J. Urb. L. 585, 586 (1974). By 1967, 105 of the larger regional and super-regional malls existed. This number increased to 199 in 1972 and to 333 in 1978. Thomas Muller, Regional Malls and Central City Retail Sales: An Overview, in Shopping Centers: U.S.A. 180, 189 (George Sternlieb & James W. Hughes eds., 1981). By 1992, the number expanded to at least 1,835. Shopping Center World/NRB 1992 Shopping Center Census, Shopping Center World, Mar. 1993, at 38.[8] Thus, from 1972 to 1992 the number of regional and super-regional malls in the nation increased by roughly 800%. In New Jersey, the number of malls greater than 400,000 square feet, or, roughly, the number of regional and super-regional malls, has more than doubled over the last twenty years, increasing from 30 in 1975 to 63 in 1992. Shopping Center Census . . ., Shopping Center World, Jan. 1977, at 21; Shopping Center World/NRB 1992 Shopping Center Census, supra, at 46.

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[8]This study reported the number of malls with gross leasing areas (GLAs) greater than 400,000 square feet. Because regional and super-regional malls have GLAs of at least 300,000 square feet, see National Research Bureau, Shopping Center Directory 1994, Eastern Volume (1993), this number most likely underestimates the number of regional and super-regional malls.

The share of retail sales attributable to regional and super-regional malls has demonstrated a similar pattern. Nationally, regional malls' market share of "shopper goods sales" was 13% in 1967 and 31% in 1979. Muller, supra, at 187. In 1991 retail sales in "shopping centers," a category that includes not only regional malls but other types of urban and suburban retail centers, "accounted for over 56% of total retail sales in the United States, excluding sales by automotive dealers and gasoline service stations." International Council of Shopping Centers, The Scope of the Shopping Center Industry in the United States, 1992-1993, at 1 (1992). In New Jersey in 1991, retail sales in shopping centers constituted 44% of non-automotive retail sales. Id. at 34.

Thus, malls are where the people can be found today. Indeed, 70% of the national adult population shop at regional malls and do so an average of 3.9 times a month, about once a week. Id. at 1. Therefore, based on adult population data from the 1990 census,[9] more than four million people on average shop at our regional shopping centers every week, assuming New Jersey follows this national pattern.

The converse story, the decline of downtown business districts, is not so easily documented by statistics. But for the purposes of this case, we do not need statistics. This Court takes judicial notice of the fact that in every major city of this state, over the past twenty years, there has been not only a decline, but in many cases a disastrous decline. This Court further takes judicial notice of the fact that this decline has been accompanied and caused by the combination of the move of residents from the city to the suburbs and the construction of shopping centers in those suburbs. See Western Pa. Socialist Workers 1982 Campaign v. Connecticut Gen. Life Ins. Co., 515 A.2d 1331, 1336 (Pa. 1986) ("Both statistics and common experience show that business districts, particularly in small and medium sized towns,

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[9]In 1990, the adult population in New Jersey was 5,931,524. I Division of Labor, Market and Demographic Research, New Jersey State Data Center 1990 Census Publication, Profiling New Jersey II: State of New Jersey (1993).

have suffered a marked decline. At the same time, shopping malls, replete with creature comforts, have boomed.").

That some downtown business districts have survived, and indeed thrive, is also fact, demonstrated on the record before us. The overriding fact, however, is that the movement from cities to the suburbs has transformed New Jersey, as it has many states. The economic lifeblood once found downtown has moved to suburban shopping centers, which have substantially displaced the downtown business districts as the centers of commercial and social activity.

The defendants in this case cannot rebut this observation. Indeed, the shopping center industry frequently boasts of the achievement. The industry often refers to large malls as " 'the new downtowns.' " Note, Private Abridgment of Speech and the State Constitutions, 90 Yale L.J. 165, 168 n.19 (1980) (quoting Shopping Center World, Feb. 1972, at 52). It correctly asserts that "the shopping center is an integral part of the economic and social fabric of America." International Council of Shopping Centers, The Scope of the Shopping Center Industry in the United States, 1992-1993, ix (1992).

Industry experts agree. One recent study asserted "[t]he suburban victory in the regional retail war was epitomized by the enclosed regional mall . . . . [Regional malls] serve as the new 'Main Streets' of the region -- the dominant form of general merchandise retailing." James W. Hughes & George Sternlieb, Rutgers Regional Report Volume III: Retailing and Regional Malls 71 (1991). Beyond that, one expert maintains that shopping centers have "evolved beyond the strictly retail stage to become a public square where people gather[ ]; it is often the only large contained place in a suburb and it provides a place for exhibitions that no other space can offer." Specialty Malls Return to the Public Square Image, Shopping Center World, Nov. 1985, at 104.

Most legal commentators also have endorsed the view that shopping centers are the functional equivalent of yesterday's downtown business district. E.g., James M. McCauley, Comment,

Transforming the Privately Owned Shopping Center into a Public Forum: PruneYard Shopping Center v. Robins, 15 U. Rich. L. Rev. 699, 721 (1981) ("[P]rivately-owned shopping centers are supplanting those traditional public business districts where free speech once flourished."); Note, Private Abridgment of Speech and the State Constitutions, supra, 90 Yale L.J. at 168 ("[T]he privately held shopping center now serves as the public trading area for much of metropolitan America.").

Statisticians and commentators, however, are not needed: a walk through downtown and a drive through the suburbs tells the whole story. And those of us who have lived through this transformation know it as an indisputable fact of life, and that fact does not escape the notice of this Court.

## III

We shall briefly summarize the lengthy history of the law of free speech that underlies this case. The relevant historical starting point is Marsh v. Alabama, 326 U.S. 501, 66 S. Ct. 276, 90 L. Ed. 265 (1946). In Marsh, the United States Supreme Court held that the First Amendment's guarantee of free speech was violated when the private owners of a company town prevented distribution of literature in its downtown business district. Finding that the company town had all the attributes of a municipality, the Court held that the private owner's action was "state action" for constitutional free speech purposes. In a democracy, the Court recognized, citizens "must make decisions which affect the welfare of community and nation. To act as good citizens they must be informed. In order to enable them to be properly informed their information must be uncensored." Id. at 508, 66 S. Ct. at 280, 90 L. Ed. at 270. The paramount right of the citizens to be informed overrode the rights of the property owners in the constitutional balance. Id. at 509, 66 S. Ct. at 280, 90 L.Ed. at 270.

The question whether citizens may exercise a right of free speech at privately-owned shopping centers without permission of the owners has been litigated extensively. The first time the

question came before the Supreme Court, the Court upheld the right of free speech at shopping centers. Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, 391 U.S. 308, 325, 88 S. Ct. 1601, 1612, 20 L. Ed. 2d 603, 616 (1968). Clearly relying on Marsh, the majority in Logan Valley ruled that shopping centers are the functional equivalent of downtown business districts and that the private owners could therefore not interfere with the exercise of the right of free speech. For First Amendment purposes that interference constituted "state action." The Court implied, but did not hold, that an unrestricted free speech right existed. Logan Valley was thereafter "limited" by Lloyd Corp. v. Tanner, 407 U.S. 551, 92 S. Ct. 2219, 33 L. Ed. 2d 131 (1972), which held that war protesters had no right of free speech at shopping centers. The Court distinguished Logan Valley, confining it to the situation in which the speech was related to shopping center activities -- a labor dispute involving one of the center's tenants -- and in which no alternative was available for the expression of views, id. at 563, 92 S. Ct. at 2226, 33 L. Ed. 2d at 139-40 -- such as the public sidewalks that surrounded the center in Lloyd.[10]

The Court in Hudgens v. NLRB, 424 U.S. 507, 517-18, 96 S. Ct. 1029, 1035-36, 47 L. Ed. 2d 196, 205-06 (1976), reviewing both Logan Valley and Lloyd, concluded not only that the reasoning of the latter amounted to a total rejection of the former, but that even the limited right of free speech (namely, that relating to shopping center activities) approved in Lloyd did not exist. That view was reaffirmed in PruneYard Shopping Center v. Robins, 447 U.S. 74, 81, 100 S. Ct. 2035, 2040-41, 64 L. Ed. 2d 741, 751-52 (1980). Those cases, Hudgens and Pruneyard, essentially held that the First Amendment right found in Marsh was

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[10]Our observation in State v. Schmid, 84, N.J. 535, 551 (1980), that "Princeton University's raison d'etre is more consonant with free speech and assembly principles that a shopping center's purposes might be" was made in connection with our analysis of Lloyd. It did not purport to be dicta based on the issue decided in Schmid, but rather noted that under the restrictive ruling in Lloyd, Princeton University was a better candidate for First Amendment free speech than was a shopping center.

limited to a privately-owned factory town, an entity that performed substantially all of the functions of government. Its actions were therefore akin to "state action," thereby triggering First Amendment protection. Not so the actions of shopping centers, whose functional equivalence to a town was limited to the downtown business district.

It is now clear that the Federal Constitution affords no general right to free speech in privately-owned shopping centers, and most State courts facing the issue have ruled the same way when State constitutional rights have been asserted. Fiesta Mall Venture v. Mecham Recall Comm., 767 P.2d 719 (Ariz. Ct. App. 1989); Cologne v. Westfarms Assocs., 469 A.2d 1201 (Conn. 1984); Citizens for Ethical Gov't v. Gwinnet Place Assoc., 392 S.E.2d 8 (Ga. 1990); Woodland v. Michigan Citizens Lobby, 378 N.W.2d 337 (Mich. 1985); SHAD Alliance v. Smith Haven Mall, 488 N.E.2d 1211 (N.Y. 1985); State v. Felmet, 273 S.E.2d 708 (N.C. 1981); Eastwood Mall v. Slanco, 626 N.E.2d 59 (Ohio 1994); Western Pa. Socialist Workers 1982 Campaign v. Connecticut Gen. Life Ins. Co., 515 A.2d 1331 (Pa. 1986); Charleston Joint Venture v. McPherson, 417 S.E.2d 544 (S.C. 1992); Southcenter Joint Venture v. National Democratic Policy Comm., 780 P.2d 1282 (Wash. 1989); Jacobs v. Major, 407 N.W.2d 832 (Wis. 1987). In most of those decisions, the courts analyzed their state constitutions and concluded that their free speech provisions protected their citizens only against state action. E.g., SHAD Alliance, supra, 488 N.E.2d 1211; Slanco, supra, 626 N.E.2d 59; Southcenter Joint Venture, supra, 780 P.2d 1282. Others relied on federal constitutional doctrine without independently analyzing their state constitutions. E.g., Citizens for Ethical Gov't, supra, 392 S.E.2d 8; Felmet, supra, 273 S.E.2d 708.

California, Oregon, Massachusetts, Colorado, and Washington, however, have held that their citizens have a right to engage in certain types of expressive conduct at privately-owned malls. Of those five, only California has held that its free speech clause protects citizens from private action as well as state action and grants issue-oriented free speech rights at a regional shopping

center. Robins v. PruneYard Shopping Ctr., 592 P.2d 341, 347 (Cal. 1979), aff'd, 447 U.S. 74, 100 S. Ct. 2035, 64 L.Ed. 2d 741 (1980). Massachusetts and Oregon relied on clauses other than their free speech clauses. Batchelder v. Allied Stores Int'l, 445 N.E.2d 590, 593 (Mass. 1983) (relying on state constitution's "free-and-equal elections" provision); Lloyd Corp. v. Whiffen, 849 P.2d 446, 453-54 (Or. 1993) (Whiffen II) (relying on state constitution's initiative and referendum provision and declining to address whether free speech clause was also source of right to collect signatures at mall). Colorado relied on its constitution's free speech provision to hold that political activists had a constitutional right to distribute literature at a privately-owned mall. Bock v. Westminster Mall Co., 819 P.2d 55 (Colo. 1991). The Bock court, however, did not dispense with a state action requirement for its free speech provision; rather, the court found that the mall that sought to prohibit the distribution of literature was a state actor. Id. at 62.

The Washington Supreme Court has done an about-face on this issue. In Alderwood Associates v. Washington Environmental Council, 635 P.2d 108 (1981), a majority of the court reversed an injunction prohibiting a group from collecting signatures at a mall, but only a four-justice plurality concluded that the state constitution's free speech clause did not have a state action requirement. In Southcenter Joint Venture, supra, 780 P.2d 1282, the court, again deeply divided, rejected the plurality position in Alderwood and held that the state's free speech provision does not protect speech on private property. However, the remainder of the holding in Alderwood -- that there was a right to solicit signatures on private property under the state constitution's initiative provision -- was not disturbed. Id. at 1290.

Pennsylvania's position on the free speech/state action issue appeared, at one time, to accord with ours in Schmid. In Commonwealth v. Tate, 432 A.2d 1382 (1981), the Pennsylvania Supreme Court held that the state constitution's free speech provision prohibited a private university from preventing people from leafletting outside a university building in which a public symposium was being held. The court specifically held that "the

state may reasonably restrict the right to possess and use property in the interests of freedom of speech, assembly, and petition." Id. at 1390. Thus, the court seems to have held that there is no state action requirement in its free speech provision. In Western Pennsylvania Socialist Workers 1982 Campaign, supra, 515 A.2d 1331, however, the same court expressly stated that the state's free speech clause provided protection only from state action, id. at 1335, and held that there is no constitutional right to collect signatures in a privately-owned shopping mall. Id. at 1339. While not overruling its previous Tate decision, the Court distinguished it by concluding that the private college in Tate had turned itself into a public forum. Id. at 1337.

From these cases we learn that the Federal Constitution does not prevent private owners from prohibiting free speech leafletting at their shopping centers because the owners' conduct does not amount to "state action"; that practically every state, when its constitutional free speech provisions have been asserted, has ruled the same way, again on the basis of a legal conclusion that state action was required. We are not out-of-step, however, for as detailed above, every state that has found certain of its constitutional free-speech-related provisions effective regardless of "state action" has ruled that shopping center owners cannot prohibit that free speech. There have been four such rulings: California (general free speech provision), Massachusetts (free and equal election provision), Oregon (initiative and referendum provision), and Washington (initiative provision). Put differently, no state with a constitutional free-speech-related provision unencumbered by any "state action" requirement has allowed shopping centers to prohibit that speech on their premises. Colorado is apparently the only state that found its constitutional "state action" requirement satisfied in the shopping center context, and ruled on that ground that the owners' denial was unconstitutional and required that leafletting be permitted.

## IV

In New Jersey, we have once before discussed the application of our State constitutional right of free speech to private

conduct. In State v. Schmid, 84 N.J. 535 (1980), appeal dismissed sub nom. Princeton University v. Schmid, 455 U.S. 100, 102 S. Ct. 867, 70 L. Ed. 2d 855 (1982), we held that the right conferred by the State Constitution was secure not only from State interference but -- under certain conditions -- from the interference of an owner of private property even when exercised on that private property. Id. at 559. Specifically, we held that Schmid, though lacking permission from Princeton University, had the right to enter the campus, distribute leaflets, and sell political materials. We ruled that the right of free speech could be exercised on the campus subject to the University's reasonable regulations.

We thus held that Article I, paragraph 6 of our State Constitution granted substantive free speech rights, and that unlike the First Amendment, those rights were not limited to protection from government interference. In effect, we found that the reach of our constitutional provision was affirmative. Precedent, text, structure, and history all compel the conclusion that the New Jersey Constitution's right of free speech is broader than the right against governmental abridgement of speech found in the First Amendment. Our holding in Schmid relied on all of these factors, id. at 557-60, presaging the criteria of later cases used to determine whether the scope of state constitutional provisions exceeded those of cognate federal provisions. E.g., State v. Hunt, 91 N.J. 338, 358-68 (1982) (Handler, J., concurring) (explaining principles for interpreting State constitutional provisions).

In this case, we continue to explore the extent of our State Constitutional right of free speech. We reach the same conclusion we did in Schmid: the State right of free speech is protected not only from abridgement by government, but also from unreasonably restrictive and oppressive conduct by private entities. Schmid, supra, 84 N.J. at 560. Applying the standard developed in Schmid to this very different case, we decide today that defendants' rules prohibiting leafletting violate plaintiff's free speech rights.

A

We found in Schmid that Princeton University, in pursuit of its own educational mission, had invited the public to participate in the intellectual life of the University in various ways, including participation in discussions of current and controversial issues. The University not only underlined its interest in free speech in various statements of policy, but in the imperative of extending participation beyond the student body so that both different views and groups would be heard. We found that this invitation included participation in various formal meetings of committees and clubs, invitations to both specific individuals and groups outside of the University body, and on occasion general invitations to the public. We held that all of these factors had the effect of opening up Princeton's property to a limited public use and that the activity sought to be carried on by Schmid was consonant with that use. Schmid, supra, 84 N.J. at 564-66.

The balancing of the various factors of the Schmid standard guided our determination. We also considered alternative channels available to Schmid for the communication of his ideas, not to determine the existence of a right, but rather to evaluate the extent to which Princeton could regulate that right. Given all of those premises, we concluded that Schmid's entry on the University's lands was not a trespass and reversed his conviction, based on our conclusion that Schmid had the right of free speech on Princeton's property. We held further that Princeton's attempts to regulate and condition speech, as those regulations and conditions then existed, were invalid because they were applied without standards. But we affirmed the underlying right of Princeton to adopt reasonable regulations concerning the time, manner, and place of such speech. Id. at 567-68.

Schmid set forth "several elements" to be considered in determining the existence and extent of the State free speech right on privately-owned property. The three factors mentioned in that opinion as the "relevant considerations," id. at 563, have

been the focus of the argument before us. As we noted in that case:

> This standard must take into account (1) the nature, purposes, and primary use of such private property, generally, its "normal" use, (2) the extent and nature of the public's invitation to use that property, and (3) the purpose of the expressional activity undertaken upon such property in relation to both the private and public use of the property. This is a multi-faceted test which must be applied to ascertain whether in a given case owners of private property may be required to permit, subject to suitable restrictions, the reasonable exercise by individuals of the constitutional freedoms of speech and assembly.
>
> [Ibid.]

The balancing of the three factors and the ultimate balance between expressional rights and private property rights was a matter of concern in Justice Schreiber's concurrence in Schmid. Noting uncertainty about whether the majority based its constitutional holding on "a balancing process" or on a "dedication to the public of its property," id. at 576 & n.1, the concurrence concluded that the dedication of private property "for a public use involving public discussion," id. at 580, was essential to justify our holding. We need not, however, examine what a dedication to the public for public discussion really means, for there is no property more thoroughly "dedicated" to public use than these regional and community shopping centers, a public use so pervasive that its all-embracing invitation to the public necessarily includes the implied invitation for plaintiff's leafletting.

In this case, the trial court held that the Schmid standard was not satisfied and, therefore, that the plaintiff had no constitutional right to leaflet at defendants' premises. New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp., 266 N.J. Super. 195 (Ch. Div. 1993). Specifically, after analyzing the proofs, it found that the common areas were not open to the public generally, but rather that "the public's invitation to each of

the defendant malls is for the purpose of the owners' and tenants' business and does not extend to the activities of leafletting or the distribution of literature." Id. at 203. Furthermore, it found that the plaintiff failed to prove that the proposed activity was not discordant with the "uses to which these shopping malls are dedicated." Id. at 204. If one focuses only on the owners' "purpose" and "dedication," these findings are literally correct.

Given those findings, the trial court and the Appellate Division concluded that the requirements of Schmid were not met. They presumably believed that it would be inappropriate to further probe the possible constitutional implications of Schmid when applied to this very different case in a novel, debatable, and most important area of constitutional law. The tradition of our judiciary under those circumstances is generally to leave constitutional determinations of that kind to this Court, and the lower courts did just that.

However, the lower courts' holdings and the defendants' view of the second factor of Schmid -- "the extent and nature of the public's invitation to use that property" -- misperceive both its essential meaning and the functional role of the standard in determining the outcome of the constitutional issue. The factual issue is the overall nature and extent of the invitation to the public, not somehow restricted to the subjective "purpose" of defendants' uses, and certainly not limited to whether defendants extended an explicit invitation to plaintiff to speak. The issue is whether defendants' actual conduct, the multitude of uses they permitted and encouraged, including expressive uses, amounted to an implied invitation and, if so, the nature and extent of that invitation. The functional role of the standard and its three elements is to measure the strength of the plaintiff's claim of expressional freedom and the strength of the private property owners' claim of a right to exclude such expression -- all for the ultimate purpose of "achiev[ing] the optimal balance between the protections to be accorded private property and those to be given to expressional freedoms exercised upon such property." Schmid, supra, 84 N.J. at 562.

We reaffirm our holding in Schmid. The test to determine the existence of the constitutional obligation is multi-faceted; the outcome depends on a consideration of all three factors of the standard and ultimately on a balancing between the protections to be accorded the rights of private property owners and the free speech rights of individuals to leaflet on their property.

**B**

We now examine the standard and determine the resulting balance in this case between free speech and private property rights. We find that each of the elements of the standard and their ultimate balance support the conclusion that leafletting is constitutionally required to be permitted.

The normal use of these properties and the nature and extent of the public's invitation to use them (the first two elements) are best considered together, for in this case they are most closely interrelated. Our view of these two factors -- the normal use and the nature and extent of the invitation to use -- is primarily factual, but also constitutional. Factually, we find an implied invitation to leaflet. Though more complex, ultimately its existence in this case is at least as clear as it was in Schmid. Constitutionally, these two elements of the standard point strongly in the direction of a constitutional right.

The predominant characteristic of the normal use of these properties is its all-inclusiveness. Found at these malls are most of the uses and activities citizens engage in outside their homes. That predominant characteristic is not at all changed by the fact that the primary purpose of the centers is profit and the primary use is commercial. Within and without the enclosures are not only stores of every kind and size, but large open spaces available to the public and suitable for numerous uses. There is space to roam, to sit down, and to talk. The public is invited to exercise by walking through the centers before the retail stores have opened for business. There are theaters, restaurants, professional offices, meeting rooms, and almost always a community table or booth

where various groups can promote causes and different activities taking place within their local area.

The invitation to the public is simple: "Come here, that's all we ask. We hope you will buy, but you do not have to, and you need not intend to. All we ask is that you come here. You can do whatever you want so long as you do not interfere with other visitors." Loitering may be "discouraged" but the record does not contain even one instance of someone ejected on that basis. That policy, if indeed it exists, has not made the slightest dent in the centers' all-embracing invitation to come there. The multitude of non-shoppers testifies to the success of this invitation, and it is a "success" because the centers know that the phenomenon of "impulse buying" will make shoppers out of many of these non-shoppers. So people go there just to meet, to talk, to "hang out," and no one stops them; indeed, they are wanted and welcome. The activities and uses, the design of the property, the open spaces, the non-retail activities, the expressive uses, all are designed to make the centers attractive to everyone, for all purposes, to make them a magnet for all people, not just shoppers. The hope is that once there they will spend. The certainty is that if they are not there they will not.

The term "expressive uses" is not intended necessarily to suggest free speech as that phrase is conventionally used, or some commitment of the centers to free speech simply because they have invited these uses. They are generally not the same expressive uses encouraged by Princeton University, uses that went to the core of free speech. But almost all are non-retail, non-commercial activities that most likely involve some element of speech, and some involve causes and issues. There are events to which the entire public was invited, free of charge. Each one, at some point in the event, in some way, presumably projected some message, even if mostly non-controversial.

These non-retail uses, expressive and otherwise,[11] underline the all-inclusiveness of defendants' invitation to the people. Not

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[11]As noted earlier, a list of non-retail activities offered by defendants is included as an appendix to this opinion. Some hint of the future is found at a

only are there the multiple uses ordinarily found in a downtown business district, and the invitation implied from that alone, but others that may not be found in the downtown business district, all explicitly sponsored by the shopping centers, the sum total amounting to the broadest, indefinable, almost limitless invitation. Speech is included; it is certainly not the goal, but it is inevitably found there, even if in modest portions, along with its inevitable messages, many deemed by most people -- but not all -- as non-controversial because they agree with the message. These uses, combined with the vast open spaces, the benches, the park-like settings, together carry the message that this is the place to be -- this is your community, where you can rest, relax, talk, listen, be entertained and be educated. The multiplicity of uses reflects the intention to bring the entire community -- its citizens and its activities -- into the center. The uses and invitation, in effect, reconstitute the community, conveniently, under one roof.

While most centers apparently permit it, some of the centers explicitly authorize issue-oriented speech at community desks and community booths. The community booth policy of Woodbridge Center provides a good illustration:

> Our shopping center is an important part of this community. We invite members of the community to shop at Woodbridge Center and to take advantage of the numerous amenities we offer. We also make our Community Booth available to community and political

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Camden County mall (Echelon Mall, apparently either a regional or community shopping center, not a defendant in this case) where the Camden County Board of Chosen Freeholders, in conjunction with the Camden County Library Commission has rented space (the "Camden County Store") where citizens, without charge, can obtain all kinds of information about county services, including specific information about matters pending before other county agencies, advice on a variety of governmental programs, including referrals to other governmental agencies, all presumably formerly available at the downtown business district of Camden city. From time to time, different agencies of county government apparently make presentations concerning their work and services. During its first two months of operations, the center has attracted more than 5,000 people. Herbert Lowe, Camden County Services Flourishing at Mall, Philadelphia Inquirer, November 29, 1994, at S1.

> organization of [sic] citizens' groups for the purpose of distributing circulars, petitions and other literature pertaining to their activities and for communication with the public regarding community affairs, subject to our rules and regulations. We have provided a Community Booth to be used for this purpose.
>
> Your presence, whether as a shopper or as a purveyor of community or political information, is welcomed; provided that you recognize and respect our right to maintain our center as clean, neat orderly, pleasant and harassment free environment for everyone.
>
> Our rules and registration form must be submitted no less than seven days prior to the desired date. Subject to availability, activities will be calendared on a first-come, first-served basis.

[Plaintiff's Appendix, 149a (first and second emphasis added).]

The centers, moreover, have apparently not excluded the partisan political speech often found in voter registration drives, most of which were sponsored by party organizations or candidates, and especially found in the conduct of the candidates (and presumably their aides) as they walk through the mall.

The breadth of the invitation and of the permitted uses suggests that the real issue in this case is not the constitutional right to leaflet, but the scope of the owners' power to regulate it. Indeed, the constitutional dispute appears to be academic for the four defendants who granted plaintiff permission to leaflet on their premises. In effect, although they deny the existence of a constitutional right, their sole practical issue with plaintiff concerns the extent of regulation, plaintiff claiming it substantially and unnecessarily restrains the effectiveness of its leafletting, and defendants claiming it is essential to protect their market.

We need not devise new legal principles of general application to determine whether defendants' explicit prohibition -- wherever it existed, and to the extent there was one -- destroys the implicit invitation or vice versa. We consider both the prohibition

and the invitation in our evaluation of this element of the standard and in our resolution of the constitutional question.

The almost limitless public use of defendants' property, its inclusion of numerous expressive uses, its total transformation of private property to the mirror image of a downtown business district and beyond that, a replica of the community itself, gives rise to an implied invitation of constitutional dimensions that cannot be obliterated by defendants' attempted denial of that invitation, an implied invitation that includes leafletting on controversial issues. The regional and community shopping centers have achieved their goal: they have become today's downtown and to some extent their own community; their invitation has brought everyone there for all purposes. Those purposes in fact -- regardless of their clear subjective profit motive -- go far beyond buying goods; they include not only expressive uses but so many different uses without any commonality other than the mix of uses that define a community, and in terms of the centers' motivation, almost anything that will bring people to the centers. This is the new, the improved, the more attractive downtown business district -- the new community -- and no use is more closely associated with the old downtown than leafletting. Defendants have taken that old downtown away from its former home and moved all of it, except free speech, to the suburbs. In a country where free speech found its home in the downtown business district, these centers can no more avoid speech than a playground avoid children, a library its readers, or a park its strollers.

Thus, the first two elements of the standard -- the normal use of the property, and the nature and extent of the public's invitation to use it -- point strongly in the direction of a constitutional right of speech.

The third factor, the relationship between "the purpose of the expressional activity . . . to both the private and public use of the property," Schmid, supra, 84 N.J. at 563, examines the compatibility of the free speech sought to be exercised with the uses of the property. We note preliminarily that where expressive activity is permitted and therefore compatible with those uses, presumptively so is leafletting, and the burden should fall on those

who claim it is not. More importantly, we find that the more than two hundred years of compatibility between free speech and the downtown business district is proof enough of its compatibility with these shopping centers. The downtown business districts at one time thrived: no one has ever contended that free speech and leafletting hurt them. The extent of their downfall has had nothing to do with free speech and leafletting. This record does not support the proposition that one dollar's worth of business will disappear because of plaintiff's leafletting even though some shoppers and non-shoppers may not like it. Furthermore, defendants' contention that leafletting on controversial issues is discordant and damaging to their purposes is inconsistent with the permission to leaflet given to plaintiff in this case by four of these centers.

These centers have full power to minimize whatever slight discordance might otherwise exist; full power to adopt rules and regulations concerning the time, place, and manner of such leafletting, regulations that will assure beyond question that the leafletting does not interfere with the shopping center's business while at the same time preserving the effectiveness of plaintiff's exercise of their constitutional right.

Thus, the third element of the standard -- the compatibility between the expressive activity and the purposes of that activity, and the public and private uses of the property -- points in the direction of the existence of the constitutional right.

We find that each of the elements of the standard in Schmid, the use, the invitation, and the suitability of free speech at the centers, supports the existence of a constitutional free speech right in the plaintiff and a corresponding obligation in the defendants. "Taken together, these . . . relevant considerations" of the "multi-faceted" standard set forth in Schmid lead to the conclusion that these regional and community shopping centers must "be required to permit, subject to suitable restrictions, the reasonable exercise by individuals of the constitutional freedoms of speech and assembly," here the leafletting sought by plaintiff. Schmid, supra 84 N.J. at 563.

C

We decide this case not only on the basis of the three-pronged test in Schmid, but also by the general balancing of expressional rights and private property rights. Schmid, supra, 84 N.J. at 560-62. The standard and its elements are specifically designed with that balancing in mind. A more general analysis of the balance provides a further test of the correctness of our determination.

The essence of the balance is fairly described by Justice Handler in Schmid:

> [P]rivate property does not "lose its private character merely because the public is generally invited to use it for designated purposes." Nevertheless, as private property becomes, on a sliding scale, committed either more or less to public use and enjoyment, there is actuated, in effect, a counterbalancing between expressional and property rights.
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> [Id. at 561 (quoting Lloyd Corp. v. Tanner, 407 U.S. 551, 569, 92 S. Ct. 2219, 2229, 33 L. Ed. 2d 131, 143 (1972)) (citations omitted).]

Or, as stated in Marsh, "[t]he more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." Marsh v. Alabama, 326 U.S. 501, 506, 66 S. Ct. 276, 278, 90 L. Ed. 265, 268 (1946), cited with approval in Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, 391 U.S. 308, 325, 88 S. Ct. 1601, 1612, 20 L. Ed. 2d 603, 616 (1968).

There is no doubt about the outcome of this balance. On one side, the weight of the private property owners' interest in controlling and limiting activities on their property has greatly diminished in view of the uses permitted and invited on that property. The private property owners in this case, the operators of regional and community malls, have intentionally transformed their

property into a public square or market, a public gathering place, a downtown business district, a community; they have told this public in every way possible that the property is theirs, to come to, to visit, to do what they please, and hopefully to shop and spend; they have done so in many ways, but mostly through the practically unlimited permitted public uses found and encouraged on their property. The sliding scale cannot slide any farther in the direction of public use and diminished private property interests.

On the other side of the balance, the weight of plaintiff's free speech interest is the most substantial in our constitutional scheme. Those interests involve speech that is central to the purpose of our right of free speech. At these centers, free speech, such as leafletting, can be exercised without discernible interference with the owners' profits or the shoppers' and non-shoppers' enjoyment. The weight of the free speech interest is thus composed of a constant and a variable: the constant is the quality of free speech, here free speech that is the most important to society; the variable is its potential interference with this diminished private property interest of the owner. Given the limited free speech right sought, leafletting accompanied only by that speech normally associated with and necessary for leafletting, and subject to the owners' broad power to regulate, that interference, if any, will be negligible.

The vindication of our State's constitutional free speech right in this case falls at least as clearly within the standard of Schmid as did the facts in that case. While the use of the campus of Princeton for free speech was a proportionately greater component of Princeton's total uses, and while Princeton had a strong institutional commitment to political free speech, the potential interference with Princeton's need to control activities on its campus and within its academic community was troublesome. Schmid, supra, 84 N.J. at 566-67. We acknowledged the sensitivity of the issue -- the overriding need of independent private universities to control their mission and to shape it without outside interference -- and our determination to respect that independence. Moreover, Princeton's commitment to free speech and its invitation to off-campus organizations and individuals is

idiosyncratic, not an essential or inevitable attribute of private universities' role in society or their success. We have no doubt that other private universities may have no such constitutional obligation and assume that Princeton itself could so change its mission, commitment, and policies as to bring into question the continued existence of the free speech right, although we doubt very much that that will occur given the University's tradition and history.

No such sensitivity exists in this case; there is no need to carefully calibrate the risk of damaging the mission of these centers, for the risk is practically non-existent. More than that, the constitutional obligation in this case arises from what we have come to recognize as the essential nature of regional shopping centers -- their all-inclusive uses and their corresponding all-embracing implied invitation to the public. For regional shopping centers, the implied expressional invitation is part of their nature, solidly embedded in their inescapable mission as the intentional successors to downtown business districts and their basic profit-making purpose. We foresee no likely change in that essential nature that would affect the elements of the standard or the ultimate balance between free speech and property rights.

We are totally satisfied that on balance plaintiff's expressional rights prevail over defendants' private property interests. We are further satisfied that the interference by defendants with plaintiff's rights constitutes unreasonably restrictive or oppressive conduct. The deprivation of free speech would affect more than a private university community, it would affect a substantial portion of the state's population.

We need not deal directly with plaintiff's common law contentions. However, in deciding the case on constitutional grounds, we draw on those sources mentioned in Hunt, supra, 91 N.J. at 363-68 (Handler, J., concurring), including our common law. It lays a foundation that would vindicate the exercise of speech and assembly rights in this setting.

In State v. Shack, 58 N.J. 297 (1971), we ruled, on common law grounds, that two employees of federally funded organizations

had the right to enter private property of an operator of a migrant labor camp to aid two migrant workers who lived and worked there. The aid included an aspect of free speech, the right to give the workers information about assistance available to them under federal statutes. By bringing migrant workers to their property, the operators of these camps created a need for free speech there that could not be denied because of its private ownership. We recognized in Shack that in necessitous circumstances, private property rights must yield to societal interests and needs, that there must be an "accommodation between the right of the owner and the interests of the general public," id. at 306, that

> while society will protect the owner in his permissible interests in land, yet ". . . [s]uch an owner must expect to find the absoluteness of his property rights curtailed by the organs of society . . . . The current balance between individualism and dominance of the social interest depends not only upon political and social ideologies, but also upon the physical and social facts of the time and place under discussion."
>
> [Id. at 305 (quoting 5 Powell on Real Property (Patrick J. Rohan, ed., 1970)).]

We also find as support for our conclusions an enduring principle recognized in Marsh, a principle that remains pertinent for our purposes even though it has not been accepted in this context as a matter of federal constitutional doctrine. The principle of that case (and Logan) is that the constitutional right of free speech cannot be determined by title to property alone. Thus, where private ownership of property that is the functional counterpart of the downtown business district has effectively monopolized significant opportunities for free speech, the owners cannot eradicate those opportunities by prohibiting it.[12]

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[12] We note the reasoning of Logan Valley and of the dissents in Lloyd and Hudgens. As noted by Justice Marshall in his dissent in Hudgens:

> [T]here is nothing in Marsh to suggest that its general approach was limited to the particular facts of that case. The underlying concern in Marsh was that traditional public channels of communication remain

D

Like many constitutional determinations, our decision today applies a constitutional provision written many years ago to a society changed in ways that could not have been foreseen. One of those changes is relatively modern: the vastly increased capability to achieve mass communication, primarily, for the moment at least, to do so through television. This emergence of television as the preeminent medium for mass communication provides no justification to deny plaintiff this constitutional right. Most fundamentally, the general right of free speech through one means has never depended on a lack of any other means; radio never diminished the right of free speech at downtown business districts.

Furthermore, television is not available as a practical matter to these issue-oriented groups. In the fourth quarter of 1993 the average cost of a national thirty-second television commercial ranged from $23,000 during daytime hours to $155,000 during prime-time hours. Adweek, Marketer's Guide to Media, Fall/Winter 1993-1994, at 27 (1993). While much lower rates for smaller audiences are available, issue-oriented groups simply cannot afford an effective television campaign. The paucity of issues advertised on television proves it. The viewer will see only those issue-oriented groups with the most substantial membership and funds. There are very few.

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free, regardless of the incidence of ownership. Given that concern, the crucial fact in Marsh was that the company owned the traditional forums essential for effective communication. . . .

In Logan Valley we recognized what the Court today refuses to recognize -- that the owner of the modern shopping center complex, by dedicating his property to public use as a business district, to some extent displaces the "State" from control of historical First Amendment forums, and may acquire a virtual monopoly of places suitable for effective communication. The roadways, parking lots, and walkways of the modern shopping center may be as essential for effective speech as the streets and sidewalks in the municipal or company-owned town.

[Hudgens v. NLRB, 424 U.S. 507, 539-40, 96 S. Ct. 1029, 1046, 47 L. Ed. 2d, 196, 218-19 (1976).]

Although no one can confidently predict the future impact of technological developments on the free speech of these groups, television at present seems in fact to do them more harm than good. As the overwhelming medium of choice, it has somewhat diminished the impact of press coverage traditionally generated by issue-oriented groups. Television's own lack of issue coverage has been widely criticized. When they are covered, the coverage almost invariably deals with majoritarian viewpoints on issues that have engaged large sectors of the public. The little-known, often unheard of, small issue-oriented groups and their views are rarely if ever mentioned. Some may not be worth hearing, but that should give little comfort in a country born of dissidents and dissenters. For these small groups, indeed for the country itself, television falls short in serving the core value of free speech -- the belief that the unpopular views of a minority, if heard, can in time become the majority view. We are a poorer nation when these small groups are silenced. The effect of the dominance of television has been to increase the need of these issue-oriented groups to reach the public through other means, and their only other practicable means is the leafletting they seek here. Justice Marshall knew it, and said it well:

> For many persons who do not have easy access to television, radio, the major newspapers, and the other forms of mass media, the only way they can express themselves to a broad range of citizens on issues of general public concern is to picket, or to handbill, or to utilize other free or relatively inexpensive means of communication. The only hope that these people have to be able to communicate effectively is to be permitted to speak in those areas in which most of their fellow citizens can be found. One such area is the business district of a city or town or its functional equivalent. And this is why respondents have a tremendous need to express themselves within Lloyd's center [a regional shopping center].

[Lloyd Corp. v. Tanner, 407 U.S. 551, 580-81, 92 S. Ct. 2219, 2234-35, 33 L. Ed. 2d 131, 149-50 (1972) (Marshall, J., dissenting).]

If constitutional provisions of this magnitude should be interpreted in light of a changed society, and we believe they should, the most important change is the emergence of these centers as the competitors of the downtown business district and to a great extent as the successors to the downtown business district. The significance of the historical path of free speech is unmistakable and compelling: the parks, the squares, and the streets, traditionally the home of free speech, were succeeded by the downtown business districts, often including those areas, the downtown business districts where that free speech followed. Those districts have now been substantially displaced by these centers. If our State constitutional right of free speech has any substance, it must continue to follow that historic path. It cannot stop at the downtown business district that has become less and less effective as a public forum. It cannot be silenced "as the traditional realm of grassroots political activity withers away." Curtis J. Berger, Pruneyard Revisited: Political Activity on Private Lands, 66 N.Y.U. L. Rev. 633, 661 (1991).

Certainty is impossible in determining the undiscoverable intent of this century-old provision in the light of changing times. In the effort, however, we must not forget that our constitutional free speech provision is different from practically all others in the nation. Schmid proclaimed this difference and it is fundamental. In New Jersey, we have an affirmative right of free speech, and neither government nor private entities can unreasonably restrict it. It is the extent of the restriction, and the circumstances of the restriction that are critical, not the identity of the party restricting free speech. Were the government ever to attempt to prohibit free speech in the downtown business district, without doubt our Constitution would prohibit it, and in New Jersey when private entities do the same thing at these centers, our Constitution prohibits that too. We cannot determine precisely the extent of damage to free speech that will call forth our constitutional

provision to prevent it, but precision is not required in this case: the damage is massive.

A change of a political nature should also be considered. The recall of elected officials and the adoption or repeal of laws and constitutional provisions through initiative and referendum have become fairly common in this country, the former -- recall -- now part of New Jersey's Constitution, the latter -- initiative and referendum -- a realistic possibility.[13] Both depend directly on petitioning and indirectly on the persuasiveness, through free speech, of the candidate, the cause, or the petitioner. In the case of recall, over one million petitioners are required if the official is the Governor, or if a county official, the average is over 48,000 signatures, and for a district, the average is 25,000.[14] As for initiative and referendum, one proposal would require over 300,000 signatures for a constitutional initiative and over 200,000 for a statutory initiative.[15] Obviously, these centers are the most likely place for realizing the goals of such laws, and perhaps the only practical place. The required number of petition signers cannot be found elsewhere. These are free speech rights of the highest order, the recall provision already approved by the people. It is unthinkable that the free speech provision of our State Constitution will not protect them at these centers.

We look back and we look ahead in an effort to determine what a constitutional provision means. If free speech is to mean anything in the future, it must be exercised at these centers. Our constitutional right encompasses more than leafletting and associated speech on sidewalks located in empty downtown business districts. It means communicating with the people in the new

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[13]We note the proposals on initiative and referendum introduced in 1994. A. Con. Res. 33, 206th Leg., 1st Sess. (1994); A. 111, 206th Leg., 1st Sess. (1994).

[14]These figures are based on the number of registered voters for the 1992 election. Center for Government Services, 1993 New Jersey Legislative District Data Book 5, 12 (1993).

[15]These projections are based on the number of voters in the 1993 gubernatorial election, as reported in the New Jersey Legislative Manual 860 (1994).

commercial and social centers; if the people have left for the shopping centers, our constitutional right includes the right to go there too, to follow them, and to talk to them.

We do not believe that those who adopted a constitutional provision granting a right of free speech wanted it to diminish in importance as society changed, to be dependent on the unrelated accidents of economic transformation, or to be silenced because of a new way of doing business.

V

Two of the defendants contend that granting plaintiff the constitutional right of free speech deprives them of their property without due process of law, takes their property without just compensation, and infringes on their right of free speech. U.S. Const. amends. I, V; N.J. Const. art. I, ¶¶ 6, 20. Each of those contentions, insofar as the Federal Constitution is concerned, was rejected in PruneYard Shopping Center v. Robins, 447 U.S. 74, 82-88, 100 S. Ct. 2035, 2041-44, 64 L. Ed. 2d 741, 752-56 (1980). Their assertion here includes the same contentions under New Jersey's Constitution, which we now reject for reasons similar to those expressed by the United States Supreme Court. Other jurisdictions that have addressed this issue have similarly relied on the federal PruneYard decision. Lloyd Corp. v. Whiffen, 849 P.2d 446, 449-50 (Or. 1992) (Whiffen II); Bock v. Westminster Mall Co., 819 P.2d 55, 62 (Colo. 1991). Insofar as invasion of private property rights is concerned, our decision in State v. Shack, 58 N.J. 297, 303-08 (1971), is similarly dispositive. We would add to the United States Supreme Court's response to the private property owners' free speech concerns (concerns underlined in Justice Powell's concurrence in PruneYard, supra, 447 U.S. at 96-101, 100 S. Ct. at 2048-51, 64 L. Ed. 2d at 761-65) that private property owners who have so transformed the life of society for their profit (and in the process, so diminished its free speech) must be held to have relinquished a part of their right of free speech. They have relinquished that part which they would now use to defeat the real and substantial need of society for free speech at their centers; they should not be

permitted to claim a theoretically-important right of silence from the multitudes they have invited. No matter how it is analyzed, the right claimed by the property owners is minimal compared to that which their claim would significantly diminish.

We do not interfere lightly with private property rights, but when they are exercised, as in this case, in a way that drastically curtails the right of freedom of speech in order to avoid a relatively minimal interference with private property, the latter must yield to the former. That does not mean that one is fundamentally more important than the other, although we believe it is, but rather that here the correct resolution of the conflict between those rights is self-evident. What is involved in this case is the right of every person and of every group to make their views known, however popular or unpopular they may be, and the right of the public to hear them and learn from them. What is involved here is the fundamental speech right of a free society. The flow of free speech in today's society is too important to be cut off simply to enhance the shopping ambience in our state's shopping centers.

Defendants, in advancing their private property concerns, contend that plaintiff's activities are discordant with their primary, indeed their exclusive, commercial goals. However, as noted earlier, the assertion of a negative effect on defendants' enterprises is not persuasively supported by the record. Even if the issue were in doubt on this record, it is an unavoidable consequence of their own activities. Our Constitution guarantees the right of free speech at their premises with all of its inevitable consequences; and while it also guarantees fair compensation if property is taken, there is no guarantee of compensation for the exercise of constitutional rights that does not result in even the slightest impact on business or profits.

## VI

Our holding today applies to all regional shopping centers. That holding is based on their essential nature.[16] The mammoth

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[16]Our holding also applies to the defendant community shopping center (The Mall at Mill Creek) but the record before us is insufficient to satisfy us

size of these regional centers, the proliferation of uses, the all-embracing quality of the implied invitation, and the compatibility of free speech with those uses: the inevitable presence and coexistence of all of those factors more than satisfy the three elements of the Schmid standard. Furthermore, these regional shopping centers are, in all significant respects, the functional equivalent of a downtown business district, a fact that provides further support for our holding. These are the essential places for the preservation of the free speech that nourishes society and was found in downtown business districts when they flourished.

We are aware of the differences among defendant regional shopping centers regarding the range of non-retail uses. The Mall at Short Hills apparently offers only musical events, visits by Santa and the Easter Bunny, and a fitness walkers' program. The other malls offer numerous public events and generally allow community groups space to promote local activities and causes; expressive uses of various kinds are common. We emphasize, however, that these differences in the degree of public activity are not material and will not exempt a regional mall from the obligation to permit free speech activity.

The list of "horribles" suggested by defendants as the inevitable consequence of our holding for other forms of private property should be dealt with now, rather than in some future litigation. No highway strip mall, no football stadium, no theater, no single huge suburban store, no stand-alone use, and no small to medium shopping center sufficiently satisfies the standard of Schmid to warrant the constitutional extension of free speech to those premises, and we so hold.

We realize there may be differences of degree and that some cases might approach a closeness that would otherwise give us pause. Similar concerns apparently infused the debate among Justices of the United States Supreme Court on these issues. Addressing precisely the same concerns expressed by defendants, Justice Marshall said: "Every member of the Court was acutely

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that it should apply to all community shopping centers. More information is necessary before that determination can be made.

aware [in Logan] that we were dealing with degrees, not absolutes. But we found that degrees of difference can be of constitutional dimension." Lloyd Corp. v. Tanner, 407 U.S. 551, 581 n.5, 92 S. Ct., 2219, 2235 n.5, 33 L. Ed. 2d, 131, 150 n.5 (1972) (Marshall, J., dissenting). Despite the degrees, the entity to which we apply the free speech right, the regional shopping center, is clearly and easily discernible and distinguishable from all others in its constitutional satisfaction of the standard of Schmid; it is distinguishable in its physical size, its multitude of uses, its layout, and its combination of characteristics that together compel the imposition of the constitutional obligation.

The inclusion of all regional shopping centers in our holding, justified by the facts before us and their clear application to all regional shopping centers, comports with the nature of the obligation as a constitutional command. We are unable, however, to apply that command to community shopping centers with only one such center before us, for while we believe all others share its characteristics, we are not yet sufficiently certain of that fact.

The justification for the limitation of our holding to regional shopping centers is obvious. Defendants' posited multitude of uses to which free speech would allegedly extend under our decision is without substance, as we have held. Using the constitutional analysis of Schmid, it is clear that in all of defendants' examples mentioned above, the three elements either will not be satisfied or their degree of satisfaction will be substantially lower than in a regional shopping center. Indeed, some of the locations that defendants suggest we be concerned about include but one use. Their implied invitation is limited since the uses at those locations do not approach the multitude of uses found at regional shopping centers. Furthermore, the limited activity at such locations is such that the exercise of free speech will generate greater interference with their normal use. The common characteristic of defendants' list is crowds, but it takes much more than crowds to trigger the constitutional obligation.

We do not, and cannot, however, foreclose the possibility that in some case with unusual circumstances the free speech right may exist elsewhere, most notably at a shopping center that

is neither regional nor community but that has clearly and consistently invited or permitted issue-oriented groups, candidates, and others, to leaflet.

Our holding is limited to leafletting and associated speech in support of, or in opposition to, causes, candidates, and parties -- political and societal free speech. We affirmatively rule that our State Constitution does not confer free speech rights at regional and community shopping centers that go beyond such speech. In addition to some doubt -- the issue is really not before us -- whether our constitutional provision was intended to cover commercial speech in any way at all, we find this limitation the result of our application of the elements and standard in Schmid. Commercial free speech at regional and community shopping centers is fundamentally so discordant with the purposes and uses of those centers as to disqualify it from constitutional protection. It is generally discordant: the owners and managers of the center, as well as the various tenants, carefully plan their merchandising strategy, their advertising programs, and are entitled to reap the rewards of their efforts without commercial interference, even well-intentioned commercial interference, from others. At a somewhat different level, the commercial free speech could obviously be directly in conflict with the centers' activities, uses, and success, the most obvious example being leafletting seeking to persuade shoppers and non-shoppers to go elsewhere. We will not require these centers to carefully review every application for commercial free speech and put them to the test of justifying its exclusion under some balance. It is obviously a most serious intrusion on the property interests of these owners; it does not satisfy the standard of Schmid; it does not have State constitutional protection.[17]

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[17]Our treatment of commercial speech is consistent with the lower level of protection afforded such speech under the Federal Constitution. As noted by Justice Clifford, "Although commercial speech is protected under the First Amendment, there is a "common-sense" distinction between speech proposing a commercial transaction and other varieties of speech, including political speech, and thus the constitutional protection accorded to commercial speech is less than is provided to other constitutionally guaranteed expression." State v. Miller, 83 N.J. 402, 412 n.5 (1980) (citing Central Hudson Gas & Elec. Corp. v. New

As for the manner of speech, our ruling is confined to leafletting and associated free speech: the speech that normally and necessarily accompanies leafletting. Plaintiff has sought no more. It does not include bullhorns, megaphones, or even a soapbox; it does not include placards, pickets, parades, and demonstrations; it does not include anything other than normal speech and then only such as is necessary to the effectiveness of the leafletting. The free speech associated with leafletting, handbilling, and pamphleteering, as commonly understood, is only that which is needed to attract the attention of passersby -- in a normal voice -- to the cause and to the fact that leaflets are available, without pressure, harassment, following, pestering, of any kind. Additionally, the sale of literature and the solicitation of funds on the spot (as distinguished from appeals found in the leaflets themselves) are not covered by the protection. In that connection, we are in accord with the reasoning of decisions in other jurisdictions. Southcenter Joint Venture v. National Democratic Policy Comm., 780 P.2d 1282, 1306 (Wash. 1989) (Utter, J., concurring) ("The nature of this speech activity [soliciting memberships and contributions] competed directly with the property interests of the mall owners and tenants -- who were in the retail business."); H-CHH Assoc. v. Citizens For Representative Gov't, 238 Cal. Rptr. 841, 859 (Cal. Ct. App. 1987), cert. denied, 485 U.S. 971, 108 S. Ct. 99 L. Ed. 2d 446 (1988) ("Any activity seeking to solicit political contributions necessarily interferes with that function by competing with the merchant tenants for the funds of [mall] patrons.").

These are the basic limits on the manner of exercising the kind of free speech that has been sought in this case. They are not intended at all to foreclose the owners from adopting time, place, and manner rules and regulations that impose further and greater limits -- nor are they intended to prevent the owners from granting greater rights.

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York Pub. Serv. Comm'n, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980)). We realize some commercial speech may be regarded as issue-oriented. We do not address that situation.

There is concern, understandable concern, about the possibility of confrontation, disturbance, and even violence -- concerns not just for business, but for the safety and security of people at the premises. Freedom of speech has always had this potential, controversy being part of its nature. Defendants' fears are not fanciful, but this is hardly a novel problem. This country, and its cities, and more to the point, its downtown business districts, have successfully dealt with it and lived with it for centuries.

We do not believe our opinion will result in any harm to these centers, to their businesses, nor any less enjoyment for those who visit, shoppers and non-shoppers. The free speech we have permitted -- leafletting only, no speeches, no parades, no demonstrations -- is the least intrusive form of free speech and the easiest to control. The experience elsewhere proves the ability of those centers to absorb such speech without harm. The rare instances of disturbance resulted from circumstances most unlikely to occur here.[18] Obviously, we cannot guarantee that disturbances will not occur as a result of our decision. Indeed, we could not guarantee freedom from such disturbances even in the absence of a right to leaflet. However, the slim possibility of disruption is the price we all pay as citizens of this state; the

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[18]We do not foresee a disturbance such as that which occurred at Westfarms Mall in Connecticut in 1983, due to the unusual nature of the circumstances surrounding that incident. As discussed in Cologne v. Westfarms Associates, 469 A.2d 1201, 1203 n.2, 1204 n.4 (Conn. 1984), an injunction against the mall allowed the National Organization for Women to solicit signatures in support of specific issues, but the mall continued to deny access to other groups. However, because of the injunction, the local police refused to respond to the mall's requests that groups leafletting without permission be evicted as trespassers. On a Sunday in May of 1983, the Ku Klux Klan attempted to appear at the mall after being denied permission. They were barred from entering the mall with the assistance of the police. After their departure, a demonstration by a number of anti-Klan protestors required the further intervention of local police, as well as that of state police. Several mall stores closed for the day as a result of the incident. It is unclear when the police responded or whether their policy of non-intervention contributed to the disturbance. The fact that this is the only such confrontation brought to the attention of this Court suggests that such incidents are rare. Given the clear terms and conditions of our opinion, the confusion that apparently contributed to the Westfarms Mall disturbance will not exist.

danger that some will abuse their rights is a necessary result of our constitutional commitment to free speech.

The centers' power to impose regulations concerning the time, place, and manner of exercising the right of free speech is extremely broad. We assume that in most cases malls can limit the time of leafletting to specific days, and a specific number of days. Certainly no individual or group will be entitled to be present any more often than is necessary to convey the message. Under some circumstances, however, a limitation to certain days may constitute an unreasonable regulation. For instance, a blanket prohibition against leafletting on the Saturday or Sunday before an election may be unreasonable. In addition, an otherwise innocuous day restriction may be unreasonable given peculiar characteristics of the speaker or the cause. Depending on the circumstances, and all of these comments depend on the circumstances, it may be necessary, as here, that if only one day is sought or permitted, the speech be permitted a fair portion of that day.

Limits on the place of exercise of the right may perhaps properly confine the exercise of free speech rights to the parking lot, or to common sidewalks and other areas outside the enclosed malls. We do not at all, however, exclude the possibility that the leafletting, to be effective, may require access to the enclosed portion of the center. To the extent leafletting is confined to some limited space, we assume that in addition to normal voice contact with passersby, an appropriately sized sign stating the cause will be permitted. Clearly, access by competing or conflicting groups may be staggered to occur on different days, or the groups may be placed far apart.

We need not and should not go beyond that. Problems of this kind concerning regulation of free speech have traditionally been resolved either through discussions and negotiations between the citizens involved and the government, usually the police, and if unsuccessful, then resolved by courts and counsel. We are certain that reasonable accommodations can be reached, though both sides may not be completely satisfied.

We believe that this constitutional free speech right, thus limited, will perform the intended role of assuring that the free speech of New Jersey's citizens can be heard, can be effective, and can reach at least as many people as it used to before the downtown business districts were transported to the malls.

We recognize that these centers will require time to prepare regulations and procedures concerning applications to leaflet and the activity itself. Those regulations and procedures must satisfy both the legitimate interest of the centers and the constitutional rights of the applicants, not always a simple matter. In order to give the centers time to address these and other matters, our judgment will not take effect until sixty days from the date of this decision.

## VII

The judgment of the Appellate Division is reversed; judgment is hereby entered, effective sixty days from the date of this decision, in favor of plaintiff declaring it has a right to leaflet on defendants' premises as described above; and judgment is entered against defendants Riverside Square Mall and The Mall at Short Hills declaring that the grant of free speech rights to plaintiff does not deprive them of the rights they have asserted under both the Federal and State Constitutions.

Justices Handler, O'Hern, and Stein join in this opinion. Justice Garibaldi has filed a separate dissenting opinion in which Justice Clifford and Judge Michels join. Justice Pollock did not participate.

## APPENDIX

[The following Appendix appeared as Appendix B to the opinion of the Superior Court, Chancery Division, reported at 266 N.J. Super. 195, 211 (1993).]

### *APPENDIX B—LIST OF EVENTS*

### *CHERRY HILL CENTER, INC.*

Cherry Hill Center sponsored the following public events which were open to Center patrons and other members of the public without admission charge, in the Center's common areas during 1990:

Bel Canto Opera Competition
Spring Fashion Show
Easter Bunny Arrival
Global ReLeaf Tree Seedling Giveaway
Bugs Bunny 50th Anniversary Show
Mickey Mouse Meet and Greet
Back Yard Circus
Fall Fashion Show
Trick or Treat at the Mall
Santa's Arrival
Senior Citizen Thanksgiving Dinner
Breakfast with Santa
Holiday Musical Performers
Mall Walkers Blood Pressure Screening
Mall Walkers 5th Anniversary Salute
Hadassah Holiday Gift Wrap
Toys for Tots
Visit Santa Claus
Singing [sic] Santa for the Hearing Impaired
Grand Re-Opening with the New Jersey Pops
Fashion Spectacular
Snoopy's Greatest Adventures
The Jones New York Collection
Concert by the New Jersey Youth Symphony
Voter Registration Campaign

## *APPENDIX B—LIST OF EVENTS*—Continued

### *WOODBRIDGE CENTER*

Woodbridge Center sponsored the following public events which were open to Center patrons and other members of the public without admission charge in the Center's common areas during 1990:

Ice Sculpture event
Hadassah Gift Wrap
Boat and Leisure Living Show
Fashion Show
Bunny Arrival
Pancake Breakfast
New Jersey Youth Symphony
NJAEYC
St. Elizabeth's Hospital Cholesterol Screening
Global ReLeaf Tree Giveaway
Mademoiselle Fashion Show
Vacation Show
Baby Fest
Father's Day Freeze Modeling
New Jersey Pops Concert Series
Mickey and Minnie Breakfast
Muppet Traffic Safety Show
Children's Fashion Show
Newark Museum Workshop
Ninja Turtle Show
Fall Fashion Show
Safe Halloween Parade
Santa's Arrival
Holiday Community Entertainment
1990 Car Show
16th Annual U.S. Marine Corp. Toys for Tots

## *APPENDIX B—LIST OF EVENTS*—Continued

### *LIVINGSTON MALL*

Livingston Mall has sponsored the following events at the Mall in 1990 to which the general public was invited without charge:

Boat & Leisure Show
Bridal Fair
Bridal Fashion Show
Spring Fashion Shows
Easter Bunny Visits Mall
Hand Made in America Craft Show
Child ID Day
Prom Fashion Show
Voter Registration Drive
Home Show
Juvenile Diabetes Walk-a-thon
Trick or Treating in the Mall
Santa Arrives
Santa Visits Mall
Story Hours
Holiday Entertainment Programs

### *ROCKAWAY TOWNSQUARE*

Rockaway Townsquare sponsored the following events at the mall in 1990 to which the general public was invited without charge:

Antique Show
Annual Bridal Festival
Bridal Fashion Event
Boat Show
Spring Fashion Event
Easter Bunny Photos
Cholesterol Screening
Meet & Greet Mickey & Minnie Mouse
Prom Fashion Event
Double Dare Road Show

## *APPENDIX B—LIST OF EVENTS*—Continued

Jail-a-thon for Cancer
Leisure Living Show
Meet & Greet Bart Simpson
German Band Performance
Back to School Fashions
Fall Fashion Event
Crime Prevention Day
Handmade in America Show
Santa's Arrival Breakfast
Photos with Santa
Choral Groups

### *MONMOUTH MALL*

Monmouth Mall has sponsored the following events at the mall during 1990 and 1991 to which the public was invited free of charge:

*1990*
Monmouth County Census Bureau Display
Children's Dental Health Promotion Day
World Gym Aerobics Presentation
Spring Fashion Show
Photos with the Easter Bunny
Freeze Modeling
Spring Community Fair
SummerSidewalk Sale
Fall Fashion Show
Halloween Celebration, With Trick-or-Treating for the Children
Photos with Santa
"Sounds of Christmas" Performances
"Makin Music" Holiday Concert
Piano Recital

*1991:*
4H — Seeing Eye Dog Mall Walk
St. Patrick's Day 5k Run at the Mall

***APPENDIX B—LIST OF EVENTS*—Continued**

Free "Video Postcards from Home" to the troops in the Gulf Program
Berlin Wall Exhibit
Lighting of the Christmas Tree
Savvy Shopper Sidewalk Sale
Photos of the Easter Bunny
After Hours Savvy Shopper Fashion Show/Cocktail Hour
Halloween at the Mall
Santa Photos Campaign
Santa Entertainment
Spring Fashion Show
July Sidewalk Sale
Fall Fashion Show
Holiday Choral Concerts
Appearance by Soap Opera Character Jackson Montgomery of "All My Children"

***THE MALL AT MILL CREEK***

The following activities of non-profit organizations occurred at The Mall at Mill Creek:

*1989*

New Jersey Prosecutor's Victim and Witness Association — Information for Crime Victims
Secaucus Recreation Department Art Display
Meadowlands Hospital Medical Center Health Fair
March of Dimes Event
Deborah Hospital Foundation Gift Wrap

*1990*

American Cancer Society Daffodil Sale
Bradley for U.S. Senate Voter Registration Drive
Fairleigh Dickinson University Information
March of Dimes Information
PSE & G Information
Secaucus Chapter of Deborah Raffle Sale
Secaucus Lions White Cane Drive
U.S. Naval Sea Cadets Recruitment

## *APPENDIX B—LIST OF EVENTS*—Continued

U.S. Army Recruiting Information
New Jersey Prosecutor's Victims and Witness Association
Information disseminated to the public
U.S. Veterans of Foreign Wars Recruiting
Secaucus High School Art Expo
American Cancer Society Jail-A-Thon

The Mall at Mill Creek sponsors a "Merry Milers Mall Walk". Participants in this event have access to the Mall during hours when the Mall shops are not yet open for business as well as during regular business hours. There is no requirement that a person shop at the Mall in order to participate in this event.

### *RIVERSIDE SQUARE SHOPPING CENTER*

Riverside Square has sponsored the following events over the last two years.

*1989:*
Business and Finance Show
Spring Fashion Show
Easter Bunny Show
Spring Events
Spring Kidfest
Springbreak Kidsfest
Home and Garden Show
Working Woman Show
Working Woman Seminar
Bergen County Read-In Festival
5th Annual Dell New Jersey Crossword Open
Summer Concert Series
Back-To-School Series
Fashion Show
8th Annual "Riverside Rapids" Speed Chess Tournament
Home Show
Halloween Kidsfest
Holiday Entertainment (Nov. 29, 1989 — Dec. 21, 1989)
1989 U.S. Marine Corps. Toys for Tots Drop Box

***APPENDIX B—LIST OF EVENTS*—Continued**

*1990:*
Winter Antique Show
"Today's Youth" Art Show
Spring Fashion Show
Earth Day Celebration
Victorian Garden Party
6th Annual Dell New Jersey Crossword Open
Great Outdoors Summer '90 Expo
Summer Antique Show
Music Festival: 5 Mondays (July 1990 — Aug. 1990)
Back-to-School Kidsfest 1990
Fall Career Fashion Show
Great Scotland Festival
9th Annual Invitational Masters Speed Chess Tournament
County Craft Festival
"Picasso of Pumpkins" Show
Halloween Activities Day
Holiday Entertainment (Nov. 28, 1990 — Dec. 24, 1990)

Most of the events took place during regular mall hours but a few occurred when the mall stores were closed and several occurred in The Meeting Room. Riverside Square has a meeting room called "The Meeting Place," which may be used for a fee by the general public. The Meeting Place can fit up to 150 people and is available for bookings Monday through Fridays from 8 A.M. to 12 noon, 1 P.M. to 5 P.M., and 6 P.M. to 9:30 P.M., and Saturday from 8 A.M. to 12 noon, and 1 P.M. to 5 P.M. All bookings must be made in advance and approved by management.

***SHORT HILLS MALL***

Short Hills has sponsored the following events in 1990 and 1991:

Mini Symphony performance of June 4
Morris Nanton Jazz Trio
String Ensemble of June 25
September Fall Concert Series
1. Nelson Riddle Orchestra

## *APPENDIX B—LIST OF EVENTS*—Continued

2. Tommy Dorsey Orchestra
3. Classical Beethoven and Bach
4. Guitars of Splendor
5. Glenn Miller Orchestra
6. Morris Nanton Jazz Trio
7. Piano Concerto
8. Classical Mozart by mini-symphony

Special Performance of Count Basie Orchestra
Santa Claus
Peter Rabbit Easter program and display
Valentine's Day piano concert series

These events were scheduled during mall hours. The September concert series was held on eight consecutive Sundays from 2 P.M. to 3 P.M.

Short Hills sponsors a fitness walk program, which allows access to the mall before daily business hours, from 7:30 A.M. until 10:00 A.M. The program is sponsored in cooperation with the Morristown Memorial Hospital and open to all members of the public who register in writing and receive a license. Over two hundred people have registered with the mall for the program.

### *QUAKERBRIDGE MALL*

The Quakerbridge Mall sponsored the following public events at the mall in 1990 to which shoppers and other members of the general public were invited without an admission charge:

Antique Show
January Sidewalk Sale
Colonial Arts Show
Boat Show
Bridal Fair
Interior Design Show
New Car Show
Boy Scouts of America
Home and Garden Show
Antique and Collectibles Show

*APPENDIX B—LIST OF EVENTS*—**Continued**

FFA Floral Design Show
Bunny Arrival
Spring Freeze Modeling
Investment Show
Health and Fitness Show
Iris Sale
Fall Kids Show
Back To Fall Fashion Show
MDA Telethon
Fall Travel Show
Home and Energy Show
Winter Survival Show
Holiday Gifting Show
Holiday Tables Show
Santa's Arrival
Breakfast with Santa

The Quakerbridge Mall had a community day in 1990 where approximately ten non-profit and non-commercial groups, including the American Cancer Society, were present. Each group had its own table located in the common area and was permitted to speak to persons and hand out literature only to persons who approached their tables. No political or religious groups were allowed to participate in community day.

On one occasion, the Quakerbridge Mall allowed representatives of Rider College to come to the mall and set up a tax information table at which visitors' questions about tax matters were answered.

The Muscular Dystrophy Association sponsored a telethon which was held in the common area of the Quakerbridge Mall. A regional phone bank was set up and entertainment was provided. Information about mall activities and tenant shops was provided by the mall.

(Quakerbridge Mall information
continued on following page . . . )

## *APPENDIX B—LIST OF EVENTS*—Continued

On one occasion, the Quakerbridge Mall's Merchant's Association and Lawrence Township jointly sponsored an exhibition and display of local municipal groups such as the volunteer fire department and the volunteer emergency medical technicians. No fundraising was conducted.

During the holiday season, choirs sing at the Quakerbridge Mall and provide entertainment.

The Merchant's Association of Quakerbridge Mall sponsors a mall walkers program jointly with a local area hospital. Participation is open to the public. No cost or purchase is necessary. The mall is opened at 8 A.M. on weekdays and Saturdays for the convenience of tenants and their employees. Members of the mall walkers program may walk in the mall at this time provided they display a membership button at all times.

### *HAMILTON MALL*

The Hamilton Mall has sponsored the following public events at the mall in 1990 to which shoppers and other members of the general public were invited without an admission charge:

Winter Clearance Sidewalk Sale
Retirement Show and Band performance
Valentine's Celebration/Bridal Fair & Fashion Show
Colonial Arts Show
Spring Home and Garden Show
Atlantic City Magazine Restaurant Gala Fashion Show
Easter Bunny Arrival Parade and Spring Freeze Modeling
Your Cholesterol Counts
Day Of The Young Child
Auto Show
Showcase of Services
Women of the 90's Show
RNS Mother's Day Celebration
Arts and Crafts Show
Master Artists Tour
Toys For Dads

***APPENDIX B—LIST OF EVENTS*—Continued**

Rose Show
Antique Shoe [sic]/Father's Day Event
Informal Modeling At The Atlantic City Race Course
Hamilton Mall Night At The Races
The Artie Shaw Band Performance and Mallwalker Club Reception
ACC Day At The Mall
Key To Success Seminar
Health To You Show
TV 40 Grand Prize Drawing
Key To Success Phase II Awards
Boat Show
Toddler Tryouts
Fall Home Show
4-H Day At The Mall
1991 Auto Preview
Halloween Trick or Treat and Costume Contest
Orchid Society Show
Santa's Arrival
Coastal Cops Celebration Holiday
Holiday Fashion Extravaganza
WKTU Charity Day
Shopper Service Day

After complying with every requirement set forth in the guidelines for non-commercial activity, the Kiwanis and Girl Scouts were permitted to use the Community Booth at the Hamilton Mall in a manner consistent with the mall's policies. A non-partisan voter registration drive was held on consecutive Saturdays in September 1990 and was sponsored by the Atlantic Area Business and Professional Women, Inc.

The mall also coordinates with local businesses a program for children ages six to twelve called "Coastal Cops." The activities include a clean-up effort of the area's benches.

Hamilton Mall Merchant's Association sponsors a mall walkers program. Participation is open to the public. No cost or

purchase is necessary. The mall is opened as early as 7 A.M. on weekdays and Saturdays for the convenience of tenants and their employees. Members of the mall walkers program may walk in the mall at this time provided they display a membership button at all times.

SUPREME COURT OF NEW JERSEY
A-124/125 September Term 1993

NEW JERSEY COALITION
AGAINST WAR IN THE MIDDLE
EAST, SYLVIA ACKELSBERG, and
DAVID CLINE,
Plaintiffs-Appellants
and Cross-Respondents,

v.

J.M.B. REALTY CORPORATION,
d/b/a Riverside Square,
PRUTAUB JOINT VENTURE,
d/b/a The Mall at Short Hills,
Defendants-Respondents
and Cross-Appellants,

and

CHERRY HILL CENTER, INC.,
d/b/a Cherry Hill Mall,
KRAVCO, INC.,
d/b/a Hamilton Mall,
EQUITY PROPERTIES & DEVELOPMENT CO., INC.,
d/b/a Monmouth Mall,
KRAVCO, INC.,
d/b/a Quakerbridge Mall,
ROCKAWAY CENTER ASSOCIATES,
d/b/a Rockaway Townsquare,
WOODBRIDGE CENTER, INC.,
d/b/a Woodbridge Center,
LIVINGSTON MALL VENTURE,
d/b/a Livingston Mall,
HARTZ MOUNTAIN INDUSTRIES, INC.,
d/b/a The Mall at Mill Creek,
Defendants-Respondents.

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GARIBALDI, J., dissenting.

Today the Court holds that the New Jersey Constitution requires that owners of privately-owned-and-operated shopping malls who invite the public onto their property for commercial purposes must allow the public free access to that property to

engage in unrestricted expressional activities, including, through the distribution of leaflets and petitions to shoppers, the promotion of various political or social views. To reach that conclusion, the majority distorts the test announced in State v. Schmid, 84 N.J. 535, 563 (1980); dismisses completely the rights of private-property owners to regulate and control the use of their own property; disregards the trial court's findings of fact, developed after an extensive eleven-day trial; and instead relies primarily on old theories that the United States Supreme Court and most other state courts long ago discarded.

Under the majority's rudderless standard, whether property is owned privately or publicly is irrelevant; whether the message is discordant with the private property's use and purpose likewise makes no difference; and whether less-convenient but equally-accessible and -effective means of distribution exist is of no moment. So long as the private property, here a shopping mall, offers an opportunity for many people to congregate, the private-property owners must grant those people free access for expressional activity, regardless of the message or of its disruptive effect. Although the Court duly notes that such access will be subject to reasonable restrictions of time, place, and manner, ante at _____ (slip op. at 70-73), its opinion reveals that the restrictions will be minimal and will present more problems and lawsuits than they will solve.

## I

The United States Supreme Court has held that the First Amendment allows the owners of private shopping malls to bar the distribution of political literature on mall property. See PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 100 S. Ct. 2035, 64 L. Ed 2d 741 (1980); Hudgens v. NLRB, 424 U.S. 507, 96 S. Ct. 1029, 47 L. Ed. 2d 196 (1976); Lloyd Corp. v. Tanner, 407 U.S. 551, 92 S. Ct. 2219, 33 L. Ed. 2d 131 (1972). However, the Supreme Court has held that a state's constitution may furnish an independent basis that surpasses the guarantees of the federal constitution in protecting individual rights of free expression and assembly. PruneYard, supra, 447 U.S. at 81, 100 S. Ct.

at 2039-40, 64 L. Ed. 2d at 752. The vast majority of states do not require that privately-owned shopping malls grant free access for expressional activity on their property. Ante at _____ (slip op. at 29).

Four provisions of Article I of the New Jersey Constitution are at issue: Paragraph 1, which concerns the unalienable right to acquire, possess, and protect property; Paragraph 20, which provides that individual persons or private corporations cannot take private property for public use without just compensation; Paragraph 6, which gives the right to speak, write, and publish freely; and Paragraph 18, which guarantees the right to assemble. We addressed the conflict between those provisions in Schmid, supra, 84 N.J. 535. However, breaking with our decision in that case, the majority engages in no balancing of those competing constitutional provisions; instead, the majority relies on only the free-speech and assembly provisions, ante at _____ (slip op. at 3), ignoring completely the private-property provisions. In so doing, it turns its back on our holding in Schmid.

Schmid involved a person's free-speech rights on the private property of Princeton University. Although situated on private property, Princeton was traditionally a forum for the free exchange of ideas, and Princeton endorsed that tradition as part of its educational mission. We therefore found it appropriate to permit Schmid free access to the University's private property to express his political views. Rather than endorse ad hoc determinations, we established a rational test under the New Jersey Constitution that balanced the rights of private-property owners and the expressional freedom of others on that private property.

> [T]he test to be applied to ascertain the parameters of the rights of speech and assembly upon privately owned property and the extent to which such property reasonably can be restricted to accommodate these rights involves several elements. This standard must take into account (1) the nature, purposes, and primary use of such private property, generally, its "normal" use, (2) the extent and nature of the public's invitation to use that property, and (3) the purpose

of the expressional activity undertaken upon such property in relation to both the private and public use of the property.

[84 N.J. at 563.]

Using a test essentially the same as Schmid, the Pennsylvania Supreme Court established, in Commonwealth v. Tate, 432 A.2d 1382 (1981), "a limiting rationale for applying [the Pennsylvania] constitution's rights of speech and assembly to property private in name but used as a forum for public debate." Western Pa. Socialist Workers 1982 Campaign v. Connecticut Gen. Life Ins. Co., 515 A.2d 1331, 1336 (Pa. 1986) (discussing Tate). The Tate court overturned a trespass conviction for distributing pamphlets on a college campus. 432 A.2d at 1391. Yet when the court reviewed a subsequent case concerning an alleged constitutional right of access to a shopping mall, it recognized that unlike a university, the shopping mall was not a public forum for political expression. Western Pa. Socialist Workers, supra, 515 A.2d at 1337. The court found that the mall "is operated as a market place for the exchange of goods and services but not as a market place for the exchange of ideas." Ibid. That rationale is entirely consistent with the Schmid Court's own finding that "Princeton University's raison d'etre is more consonant with free speech and assembly principles than a shopping center's purposes might be * * * ." 84 N.J. at 551. Unlike universities, shopping malls are not public forums dedicated to public use or to the exchange of ideas.

## II

Although the majority alleges that it is adhering to Schmid, its opinion discloses that it is not. Indeed, the majority has forgotten the primary premise of Schmid, that a balance must be found between the rights of private-property owners and the expressional freedom of others on that property. A proper application of Schmid supports the trial court's judgment, which the Appellate Division affirmed, that the mall owners may bar Coalition from distributing its leaflets in the malls.

After a close and careful examination of the normal use of each mall and the public invitation each mall extended, the trial court set forth its factual findings. The first prong of the Schmid test requires a court to take into account the nature, purposes, and primary use of the private property -- its "normal" use. In that regard, the trial court concluded:

> It is this court's opinion that that question may be answered unequivocally. The nature, purpose and primary use of the malls is commercial. The shopping malls are retail establishments, constructed, designed and maintained to do business and make a profit. I did not hear one fact at trial which controverts or contradicts this finding. The plaintiff offered no proofs which will lead this court to any other conclusion.
>
> [266 N.J. Super. 195, 200 (Law Div. 1991) (emphasis added).]

Moreover, the trial court found "from all of the credible evidence [that] has been offered at this trial that each of these ten malls has dedicated its facilities and property to its primary purpose, that is, business and commercial ventures." Ibid.

In respect of the second Schmid factor, the extent and nature of the public's invitation to use the private property, the trial court stated:

> From the credible evidence offered by the defendants, that is, the testimony of mall managers, designers and planners, I find that the public's invitation to each of the defendant malls is for the purpose of the owners' and tenants' business and does not extend to the activities of leafletting or the distribution of literature.
>
> [Id. at 203 (emphasis added).]

Additionally, the trial court determined that "the primary purpose of each and every one of the activities listed [e.g., free concerts, Earth Day celebrations, and Girl Scout Cookie sales] * * * is to draw people to the mall and thereby maximize sales and increase profits." Id. at 202.

Despite the trial court's findings, the majority baldly asserts that the mall owners issued an invitation to the public to use their private property "to do what they please" and granted "practically unlimited permitted public uses * * * on their property." Ante at _____ (slip op. at 50). Under the majority's reasoning, the nature and extent of the invitation is of no moment. By the majority's analysis, any time the public is invited onto large, privately-owned property, it becomes a place to congregate and therefore becomes the functional equivalent of a downtown area. In Lloyd Corp., supra, the United States Supreme Court rejected the "functional equivalent" analysis, finding:

> The invitation is to come to the Center to do business with the tenants. It is true that facilities at the Center are used for certain meetings and for various promotional activities. The obvious purpose, recognized widely as legitimate and responsible business activity, is to bring potential shoppers to the Center, to create a favorable impression, and to generate goodwill. There is no open-ended invitation to the public to use the Center for any and all purposes, however incompatible with the interests of both the stores and the shoppers whom they serve.
>
> [407 U.S. at 564-65, 92 S. Ct. at 2227, 33 L. Ed. 2d at 140.]

As the Supreme Court further explained, "Nor does property lose its private character merely because the public is generally invited to use it for designated purposes." Id. at 569, 92 S. Ct. at 2229, 33 L. Ed. 2d at 143. See also Schmid, supra, 84 N.J. at 561.

Ignoring the trial court's detailed factual findings, the majority rewrites Schmid, lumps the first two factors together into one, and continually misapprehends the test. Ante at _____ (slip op. at 40). The majority repeatedly refers to the first factor as the "normal" use, but ignores the language prior to that: "the nature, purposes and primary use of the private property." The primary use of a shopping mall is shopping, an obvious fact that the majority fails to understand.

Indeed, strikingly absent from the majority opinion is any awareness that the primary users of shopping malls are shoppers.

> We should not lose sight of the fact that persons who own and operate shopping malls are merchants. As such they should not be required to provide forum, place, or occasion for speech making, petition signing, parades, or cracker barrels, to discuss local or global events. They are in business for business sake. They are not municipalities, states, or villages, and however romantic it may be to believe that the public repair to these galvanic places, of a Saturday morning, for more than bread and salt, they are not yet instruments of the state.
>
> [Western Pa. Socialist Workers, supra, 515 A.2d at 1341 (McDermott, J., concurring).]

In contrast to the purpose of a shopping mall, the primary purpose of a university is to educate, i.e., to increase the wealth of human knowledge, which can be done only through discourse and discussion, free and open debate. That is the significant difference between Princeton University and The Mall at Short Hills. Shopping can be accomplished even with mouths shut and minds closed.

The majority ignores any distinction between the purpose of Princeton and the purpose of a mall. "We need not, however, examine what a dedication to the public for public discussion really means, for there is no property more thoroughly 'dedicated' to public use than these regional and community shopping centers * * * ." Ante at _____ (slip op. at 37). Therefore, under the majority's reasoning, whether the property, like Princeton University, was dedicated to the public for public discussion is irrelevant. All that matters is that the property was open to the public, as is a shopping mall or any other large gathering space. An example of a publicly-accessible place that will become an open forum for expression under the majority's analysis is Great Adventure Theme Park. That result is plainly absurd.

The third prong of the Schmid analysis directs a court to consider the "purpose of the expressional activity undertaken upon such property in relation to both the private and public use of the property". 84 N.J. at 563. That requires determining "whether the expressional activities undertaken * * * are discordant in any sense with both the private and public uses of the [property at issue]." Id. at 565. The trial court found that the "plaintiffs have not met their burden of proving that their activities are not discordant with both the public and private uses to which these shopping malls are dedicated." 266 N.J. Super. at 204.

Obviously, the expressed purpose of plaintiffs' activity was to oppose the war in the Middle East, a purpose totally unrelated to the mall owners' commercial purposes and to their invitation to the public to shop there. Additionally, confrontations between groups advocating opposing views on a controversial political or social topic are likely, and those groups' purposes will clearly be discordant with shopping. The abortion debate is an easily-identifiable issue to consider under the Court's opinion. Clearly, a mall allowing a pro-choice group to distribute pamphlets will face opposition from pro-life groups. Yet under the majority's opinion, a mall owner could not restrict such groups from its private property.

When advocates press hotly-contested political and social issues, confrontation is an easily-foreseen outcome. In Cologne v. Westfarms Associates, 469 A.2d 1201 (Conn. 1984), a mall refused to permit members of the Ku Klux Klan to rally there. After the Klan's departure, however, a number of anti-Klan demonstrators, responding to reports of the intended appearance of the Klan, engaged in a heated demonstration outside the mall building. Police from several area towns and the state police were necessary to bring the situation under control. The demonstration resulted in the closing of some shopping-mall doors for the day.

As one of the defendants stated in its brief:

> Should the Ku Klux Klan in their flowing white robes or the Black Separatists in their paramilitary gear

> be permitted on the mall's property? These groups would offend even the most tolerant of shoppers. What shopper does not have an opinion on abortion, so that same question applies to pro-choice and pro-life advocates with their gruesome displays. Should an animal rights group, regardless of its graphic illustrations, be permitted near a pet shop or fur salon? Should the Vietnam Veterans and SANE be permitted to conduct activities on the same day in proximity to each other? What standards should a mall manager use when considering the graphic portrayal on a placard, when measuring the strong language in a leaflet or when evaluating the appropriateness of a costume or clothing? Aside from "controversial" issues, a host of content-based questions arise once politicians, religious groups, charities and "causes" invade the mall.

Each mall owner will have to answer those subjective questions, as well as many others, on a daily basis. Although the majority recognizes the difficulty in preparing regulations and procedures concerning leafletting in the malls, ante at _____ (slip op. at 74) (granting sixty day stay), they provide no standards for the mall owners to use in resolving those problems. Moreover, regardless of the standards used, each mall owner will be second-guessed and litigation concerning the private owner's decision will ensue. Public officials may have to face those issues in granting parade permits, but private-property owners should not be forced to decide those value-laden questions.

The morass that the majority opinion will produce is already demonstrated in the troubles that arise when public officials must determine what constitute legitimate time, place, and manner restrictions on the free expression of ideas on public property. See, e.g., National Socialist Party of Am. v. Village of Skokie, 432 U.S. 43, 97 S. Ct. 2205, 53 L. Ed. 2d 96 (1977). Private-property owners should not be compelled to face the same challenges when they decide which groups may or may not champion their causes at these privately-owned-and-operated shopping malls.

## III

To circumvent the detailed and meticulous findings of the trial court, the majority departs from the Schmid test and argues that shopping malls are the "functional equivalent" of the traditional downtown business districts or town squares. Ante at _____ (slip op. at 25, 46). In support of that theory, the majority relies on "common knowledge" of the Court outside the record, ignoring the factual findings of the trial court and evidence that many of the towns in Essex, Hudson, and Morris Counties around the malls have become more, not less, vibrant.

Under the majority's theory, private property becomes municipal land and private-property owners become the government. The United States Supreme Court discredited that proposition over twenty years ago, Lloyd Corp., supra, 407 U.S. 551, 92 S. Ct. 2219, 33 L. Ed. 2d 131, and likewise almost every state court that has considered it has discarded it. See, e.g., Fiesta Mall Venture v. Mecham Recall Comm., 767 P.2d 719 (Ariz. Ct. App. 1989); Cologne, supra, 469 A.2d 1201; Citizens for Ethical Gov't, Inc. v. Gwinnett Place Assocs., 392 S.E.2d 8 (Ga. 1990); Woodland v. Michigan Citizens Lobby, 378 N.W.2d 337 (Mich. 1985); SHAD Alliance v. Smith Haven Mall, 488 N.E.2d 1211 (N.Y. 1985); State v. Felmet, 273 S.E.2d 708 (N.C. 1981); Eastwood Mall v. Slanco, 626 N.E.2d 59 (Ohio 1994); Western Pa. Socialist Workers, supra, 515 A.2d 1331; Charleston Joint Venture v. McPherson, 417 S.E.2d 544 (S.C. 1992); Southcenter Joint Venture v. National Democratic Policy Comm., 780 P.2d 1282 (Wash. 1989); Jacobs v. Major, 407 N.W.2d 832 (Wis. 1987).

To reach its conclusion, the Court relies on the long-overruled statement in Logan Valley that shopping centers are the functional equivalent of downtown areas. See Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, 391 U.S. 308, 318, 88 S. Ct. 1601, 1608, 20 L. Ed. 2d 603, 612 (1968). The Logan Valley Court, in turn, based its holding on Marsh v. Alabama, 326 U.S. 501, 66 S. Ct. 276, 90 L. Ed. 265 (1946), and found an analogy between the sidewalks and parking areas of a shopping mall and the company town in Marsh. As we noted in

Schmid, supra, 84 N.J. at 550, Lloyd Corp. repudiated Logan Valley. Nevertheless, the majority, like the Logan Valley Court, contends that plaintiffs here should have access to the shopping malls just as the Court gave the petitioner in Marsh access to the business district. Indeed, the majority relies on the discredited reasoning of Logan Valley and of the dissents in Lloyd Corp. and Hudgens. Ante at ____, ____, ____, ____ (slip op. at 54, 55, 57, 65).

Although I question whether Marsh still has validity, a "company town" is easily distinguishable from a shopping mall. Justice Black, who wrote Marsh, aptly pointed out the difference in his Logan Valley dissent:

> But Marsh was never intended to apply to this kind of situation. . . . I can find very little resemblance between the shopping center involved in this case and Chickasaw, Alabama.
>
> . . . .
>
> . . . [T]his reasoning completely misreads Marsh and begs the question. The question is, Under what circumstances can private property be treated as though it were public? . . . I can find nothing in Marsh which indicates that if one of these features is present, e.g., a business district, this is sufficient for the Court to confiscate a part of an owner's private property and give its use to people who want to picket on it.
>
> [391 U.S. at 330-32, 88 S. Ct. at 1615, 20 L. Ed.2d at 619-20 (emphasis added).]

The United States Supreme Court adopted that position in Lloyd Corp., effectively rejecting Logan Valley's "functional equivalent" rationale. 407 U.S. at 569, 92 S. Ct. at 2229, 33 L. Ed. 2d at 143; see also Fiesta Mall, supra, 767 P.2d 719 (rejecting functional equivalent argument). To borrow from Lloyd Corp., "the instant case provides no comparable assumption or exercise of municipal

functions or powers." Ibid. Additionally, the Fiesta Mall court, relying on Lloyd Corp., found that shopping malls

> are not the functional equivalent of towns. They are simply areas in which a large number of retail businesses is grouped together for convenience and efficiency. Their sole purpose is for shopping, and appellant's argument that they are opened early for joggers and walkers, that large numbers of people are present in them each day, that occasionally non-commercial activities take place in them and that people enjoy air-conditioned comfort in them during Phoenix's scorching summers does not change that basic fact.
>
> [767 P.2d at 724.]

Relying on the functional-equivalent test, yet paying lip service to Schmid, the Court writes:

> No such sensitivity exists in this case; there is no need to carefully calibrate the risk of damaging the mission of these centers, for the risk is practically nonexistent. More than that, the constitutional obligation in this case arises from what we have come to recognize as the essential nature of regional shopping centers -- their all-inclusive uses and their corresponding all-embracing implied invitation to the public. For regional shopping centers, the implied expressional invitation is part of their nature, solidly embedded in their inescapable mission as the intentional successors to downtown business districts and their basic profit-making purpose. We foresee no likely change in that essential nature that would affect the elements of the standard or the ultimate balance between free speech and property rights.
>
> [Ante at ____ (slip op. at 51-52)].

The inescapable mission of shopping malls is not to be the successor to downtown business districts; rather, it is to provide a comfortable and conducive atmosphere for shopping, a mission into which mall owners have invested large sums and energy.

Common sense also dictates that privately-owned-and-operated shopping malls are not the functional equivalent of downtown business districts. They are not "replica[s] of the community itself." Ante at ____ (slip op. at 45). Shopping malls do not have housing, town halls, libraries, houses of worship, hospitals, or schools. Nor do they contain the small stores, such as the corner grocer, that used to serve as the forum for exchange of ideas. Indeed, most shopping malls do not allow people even to walk their dogs there.

The shopping mall is not a community. There is no "mayor of the mall." Shoppers do not elect a common council. They do not have a say in the day-to-day affairs of the mall, nor do they expect one. They do not visit the mall to be informed or to inform others of social or political causes; they go to shop. Even though the malls sponsor community events, visits from Santa, and orchestral concerts, visitors do not mistake them for grassroots gathering places, Santa's Workshop, or a mecca of the arts or culture. See, e.g., Southcenter Joint Venture, supra, 780 P.2d at 1292 ("[S]hopping malls are concerned with just one aspect of their patrons' lives -- shopping."); Jacobs, supra, 407 N.W.2d at 845 ("Opening the mall 'avenues' would be like opening the private businesses in the Marsh community. Since neither has an essentially public nature, we cannot hold them subject to the same constitutional requirements with which public property must comply.").

Plaintiffs, and the majority, also rely on this Court's decision in State v. Shack, 58 N.J. 297 (1971). Ante at ____ (slip op. at 53-54). Like Marsh, Shack is factually inapposite and therefore provides no basis for the Court's opinion. The circumstances of the instant case stand in stark contrast to those in Shack. Here effective alternative means of communication are readily available. Moreover, the people whom the Coalition sought to reach at the malls are far from the disadvantaged, impoverished people of Shack who were subject to the singular authority of the property owner; they are visitors to a mall drawn to that location for commercial purposes. No compelling interest or policy mandates an invasion of the property owner's rights. Nothing in this case

forces this Court to subserve the rights of private-property owners to the free-speech rights of the public as we were compelled to do in Shack.

## IV

The majority states, "What is involved in this case is the right of every person and of every group to make their views known, however popular or unpopular they may be, and the right of the public to hear them and learn from them." Ante at ____ (slip op. at 63). I find it axiomatic that the right to speak freely is inextricably linked with a right to a forum in which to express those thoughts and ideas. Without such a forum, the right of free expression would be nugatory. Traditionally, that forum has been on public property.

Our decision in Schmid extended that forum onto private property, but only in those limited situations in which the factors outlined in that opinion weighed in favor of extending that right to private property. The majority's decision today guarantees the right to a forum for free expression not only on public property, or on private property in the limited circumstances as permitted under Schmid, but on all private property -- not just shopping malls -- where a captive audience can readily be found. Like the court in Cologne, I too am unable to "discern any legal basis distinguishing this commercial complex from other places where large numbers of people congregate, affording superior opportunities for political solicitation, such as sport stadiums, convention halls, theaters, county fairs, large office or apartment buildings, factories, supermarkets or department stores." 469 A.2d at 1209; see also Southcenter, supra, 780 P.2d at 1292 (same); Woodland, supra, 378 N.W.2d at 353 ("'Nor is size alone the controlling factor. The essentially private character of a store and its privately owned abutting property does not change by virtue of being large or clustered with other stores in a modern shopping center.'" (quoting Lloyd Corp., supra, 407 U.S. at 569, 92 S. Ct. at 2229, L. Ed. 2d at 143)).

The majority attempts to limit its holding to all regional malls and the one community mall involved in this action. Ante at ____ (slip op. at 64). That limitation is based on the Court's understanding of a regional shopping center's "essential nature": "The mammoth size of these regional centers, the proliferation of uses, the all-embracing quality of the implied invitation * * *." Ibid. Yet the facts adduced at trial, the descriptions of each of these malls and the activities that did and did not take place in them, even the trade's determination of what constitutes a regional mall, ante at _____ (slip op. at 12-13), reveal vast differences among these properties. Their only commonality is that they attract large numbers of people for commercial gain.

Moreover, despite its assertion that its holding is limited to large regional malls, the Court states that

> [i]n New Jersey, we have an affirmative right of free speech, and neither government nor private entities can unreasonably restrict it. It is the extent of the restriction, and the circumstances of the restriction that are critical, not the identity of the party restricting free speech.
>
> [Ante at _____ (slip op. at 58-59)].

That broad assertion limits nothing; in fact, it extends this holding far beyond that ever contemplated in Schmid, perhaps beyond that ever contemplated by the drafters of New Jersey's constitutional free speech provisions.

In reaching its result, the majority completely ignores the rights the New Jersey Constitution grants to the owners of private property. See art. I, paras. 1, 20. No support exists for the proposition that the majority announces today, that a right to free expression exists anywhere an audience may be found. The constitutional right to free expression does not command such an extreme result. It guarantees a forum, not an audience.

V

The majority's opinion ignores the basic commercial purpose of these private malls, ascribes to them the downfall of urban business districts, and delegates to them the responsibility to fulfill the role once, and arguably still, played by town squares. It does all of that without any legitimate or rational justification. Moreover, the Court places burdens on the private malls that they are ill-suited to handle. Ultimately, mall owners will pass those burdens on to the consumer. The private property owner and ultimately the consumer, the forgotten person in the majority opinion, will have to pay the increased costs that result from the expanded security and other expenses associated with the public's free access to the mall for expressional activities. Unlike the municipalities that the majority thinks the malls have supplanted, malls are not exempt from most tort claims under the New Jersey Tort Claims Act, N.J.S.A. 59:1-1 to :12-3.

Plaintiffs cannot claim that they have no means to express their opinion to the public other than by distributing pamphlets in shopping malls. No evidence shows that plaintiffs could not effectively distribute their pamphlets in other areas. Indeed, according to plaintiff's November 9, 1990, press release, they distributed their materials in at least thirty locations, including several downtown areas. Ante at _____ n.3 (slip op. at 9 n.3). They were able to distribute over 85,000 pamphlets in those locations during a three-day period. Plaintiffs do not need to use the malls, save for their own convenience. See ante at _____ (slip op. at 59-60) (discussing convenience and ease of using shopping malls for petition signing). "Petitioners' convenience, however, does not create a constitutional right of access to private property for political activity." Citizens For Ethical Gov't, supra, 392 S.E.2d at 9.

The majority seems to assert that absent our creation of a right of free expression on this privately-owned property, the patrons therein would not receive important news and information about significant societal issues. Yet unlike the migrant workers in Shack, shoppers are free to come to and go from these malls as

they choose. They can avail themselves of all the burdens and benefits of free society as they like.

Were we to adhere to Schmid and deny access to the malls, plaintiffs would nevertheless remain able to reach the public outside supermarkets and movie theaters, at train stations and bus stops, in parks and post offices, in the media, and even in the numerous still-vibrant downtown shopping districts. Plaintiffs can voice their opinions today more readily and more accessibly in more places and in more formats than ever before in human history.

Plaintiffs predicate their desires to express themselves on the private property of these shopping malls not on some constitutional mandate but rather on considerations of efficiency, cost, and convenience. Yet such factors do not a constitutional right create. Schmid, properly applied, has adequately served this state, both its protesting citizens and its private-property owners, for more than a decade. The majority's departure from Schmid's established standard is unprecedented. It makes neither good sense nor good law, and for those reasons, I respectfully dissent.

Justice Clifford and Judge Michels join in this opinion.

SUPREME COURT OF NEW JERSEY

No. A-124/125 SEPTEMBER TERM 1993

ON APPEAL FROM

ON CERTIFICATION TO Appellate Division, Superior Court

NEW JERSEY COALITION
AGAINST WAR IN THE MIDDLE
EAST, SYLVIA ACKELSBERG, and
DAVID CLINE,
Plaintiffs-Appellants
and Cross-Respondents,

v.

J.M.B. REALTY CORPORATION,
d/b/a Riverside Square,
PRUTAUB JOINT VENTURE,
d/b/a The Mall at Short Hills,
Defendants-Respondents
and Cross-Appellants,

and

CHERRY HILL CENTER, INC.,
d/b/a Cherry Hill Mall, et al.,
Defendants-Respondents.

DECIDED December 20, 1994

Chief Justice Wilentz PRESIDING

OPINION BY Chief Justice Wilentz

CONCURRING OPINION BY

DISSENTING OPINION BY Justice Garibaldi

| CHECKLIST | REVERSE | AFFIRM | |
|---|---|---|---|
| CHIEF JUSTICE WILENTZ | X | | |
| JUSTICE CLIFFORD | | X | |
| JUSTICE HANDLER | X | | |
| JUSTICE O'HERN | X | | |
| JUSTICE GARIBALDI | | X | |
| JUSTICE STEIN | X | | |
| JUDGE MICHELS | | X | |
| TOTALS | 4 | 3 | |

NEW JERSEY COALITION AGAINST WAR IN THE MIDDLE EAST, et al.,
Plaintiffs-Petitioners, v.
J.M.B. REALTY CORPORATION, etc., et al.,
Defendants-Respondents.

NEW JERSEY COALITION v. J.M.B. REALTY CORP.

37,153

SUPREME COURT OF NEW JERSEY

636 A.2d 522; 1993 N.J. LEXIS 1368

October 26, 1993, Decided

October 26, 1993, Filed

OPINION: [*1]

ON PETITION FOR CERTIFICATION

To the Appellate Division, Superior Court:

A petition for certification of the judgement in A-588-91 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is granted.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 26th day of October, 1993.

NEW JERSEY COALITION AGAINST WAR IN THE MIDDLE EAST, et al.,
Plaintiffs-Cross-Respondents, v.
J.M.B. REALTY CORPORATION, etc., et al.,
Defendants-Cross-Petitioners.

NEW JERSEY COALITION v. J.M.B. REALTY CORP.

37,153

SUPREME COURT OF NEW JERSEY

636 A.2d 522; 1993 N.J. LEXIS 1363

October 26, 1993, Decided

October 26, 1993, Filed

OPINION: [*1]

ON CROSS-PETITION FOR CERTIFICATION

To the Appellate Division, Superior Court:

A cross-petition for certification of the judgment in A-588-91 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the cross-petition for certification is granted.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 26th day of October, 1993.

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-588-91T5

NEW JERSEY COALITION AGAINST WAR
IN THE MIDDLE EAST, SYLVIA ACKELSBERG,
and DAVID CLINE,
Plaintiffs-Appellants,
Cross-Respondents,

v.

J.M.B. REALTY CORPORATION,
d/b/a RIVERSIDE SQUARE, and
PRUTAUB JOINT VENTURE,
d/b/a THE MALL AT SHORT HILLS;
Defendants-Respondents
Cross-Appellants,

and

CHERRY HILL CENTER, INC.,
d/b/a CHERRY HILL MALL; KRAVCO, INC.,
d/b/a HAMILTON MALL;
EQUITY PROPERTIES & DEVELOPMENT COMPANY,
d/b/a MONMOUTH MALL; KRAVCO, INC.,
d/b/a QUAKERBRIDGE MALL;
ROCKAWAY CENTER ASSOCIATES,
d/b/a ROCKAWAY TOWNSQUARE;
WOODBRIDGE CENTER, INC.,
d/b/a WOODBRIDGE CENTER;
LIVINGSTON MALL VENTURE,
d/b/a LIVINGSTON MALL;
HARTZ MOUNTAIN INDUSTRIES, INC.,
d/b/a THE MALL AT MILL CREEK,
Defendants-Respondents

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Argued: March 8, 1993 — Decided: June 24, 1993

Before Judges Petrella, D'Annunzio and Keefe

On appeal from Superior Court, Chancery Division, Bergen County whose decision is reported at ____ N.J. Super. ____ (Ch. Div. 1991).

Frank Askin, Rutgers Constitutional Litigation Clinic, and William J. Volonte of Reitman, Parsonnet & Duggan argued the cause for appellants (Deborah Ellis, of counsel; Messrs. Askin, Howard Moskowitz and Volonte, on the brief).

Joseph Aviv argued the cause for respondents-cross-appellants JMB Income Properties, Ltd.-XI (incorrectly denominated J.M.E. Realty Corporation in the complaint), d/b/a Riverside Square, and Prutaub Joint Venture, d/b/a The Mall at Short Hills (Miro, Miro & Weiner and Cuyler, Burk & Mathews, attorneys; Mr. Aviv and Jo Ann Burk, on the brief).

Nicholas deB. Katzenbach argued the cause for respondents Woodbridge Center, Inc., d/b/a Woodbridge Center, and Cherry Hill Center, Inc., d/b/a Cherry Hill Mall (Riker, Danzig, Scherer, Hyland & Perretti, attorneys; Mr. Katzenbach and Anne M. Patterson, on the brief).

Brian J. McMahon argued the cause for respondents Hamilton Associates, d/b/a Hamilton Mall, and Lawrence Associates, d/b/a Quakerbridge Mall (both incorrectly denominated Kravco, Inc. in the complaint), (Crummy, Del Deo, Dolan, Griffinger & Vecchione, attorneys; Mr. McMahon and John T. Wolak, on the brief).

Ronald E. Wiss argued the cause for respondents Livingston Mall Venture, d/b/a Livingston Mall, and Rockaway Center Associates, d/b/a Rockaway Townsquare (Wolff & Samson, attorneys; Mr. Wiss and Sandra Nachshen, on the brief).

Mark A. Steinberg argued the cause for respondent Equity Properties and Development Co., Inc., d/b/a Monmouth Mall (Steinberg and Fellenz, attorneys; Mr. Steinberg, on the brief).

Curtis L. Michael argued the cause for respondent Hartz Mountain Industries, Inc., d/b/a The Mall at Mill Creek (Horowitz, Rubino & Associates, attorneys; Mr. Michael, of counsel and on the brief).

Robert F. Williams, attorney for amici curiae New Jersey Environmental Lobby, League of Women Voters of N.J., Hands Across N.J., United Food and Commercial Workers Union, Locals 1245, 1262, 1358 and 56, Hotel Employees and Restaurant Employees International Union, Local 54.

Bernard A. Kuttner, attorney for amici curiae United Farm Workers of America, AFL CIO, and New Jersey Consumer Coalition.

Zulima V. Farber, Public Advocate, as amicus curiae (Isabel McGinty, Assistant Deputy Public Advocate, on the brief).

PER CURIAM

Plaintiffs appeal from an order of the Chancery Division upholding the rights of defendants, owners of private property in the form of various shopping malls located throughout the state, to prohibit or restrict leafletting on their properties under the criteria set forth in State v. Schmid, 84 N.J. 535 (1980), appeal dismissed sub nom. Princeton Univ. v. Schmid, 455 U.S. 100, 102 S. Ct. 867, 70 L. Ed. 2d 855 (1982).

Plaintiffs argue that they should have been allowed to distribute leaflets at the defendants' privately owned shopping malls under the three-part test in Schmid, and that privately owned shopping malls have an obligation to accommodate plaintiffs' exercise of free speech rights under common law.

Our review of the record in light of the arguments presented satisfies us that the findings and conclusions of the Chancery Judge are amply supported by the record. See Rova Farms Resort v. Investors Ins. Co., 65 N.J. 474, 484 (1974). The qualitative weight of the factors involved in application of the Schmid test balances here in favor of the mall owners, particularly in light of the Chancery Judge's findings, adequately supported by the record, of the essentially commercial nature of the shopping malls. Cf. State v. Guice, ___ N.J. Super. ___ (Law Div. 1993).

We reject plaintiffs' alternative grounds for relief based on a claim that New Jersey's common law requires (or should be construed or modified to require) that the mall owners allow plaintiffs to engage in expressional activity on defendants' properties. Such a modification of the common law is not supported by precedent.

In light of our determination, we need not address the cross-appeal of the defendants JMB Income Properties, Ltd. - XI[1] and Prutaub Joint Venture in which they assert that a finding in favor of plaintiffs would constitute a taking of defendants' properties and a denial of their right of free speech. We also find it unnecessary to address plaintiffs' challenge to various regulations adopted by certain of the malls restricting the scope, nature and extent of access.

We affirm substantially for the reasons expressed by Judge Ciolino in his written decision of July 25, 1991 reported at ____ N.J. Super. ____ (Ch. Div. 1991).

I hereby certify that the foregoing
is a true copy of the original on file
in my office.

/s/
Clerk

[1]Incorrectly denominated "J.M.B. Realty Corporation" in the complaint.

**NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS**

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION, BERGEN COUNTY
DOCKET NO. C-477-90

NEW JERSEY COALITION AGAINST WAR IN THE MIDDLE EAST, SYLVIA ACKELSBERG, and DAVID CLINE,
Plaintiffs
-vs-
J. M. B. REALTY CORPORATION, d/b/a RIVERSIDE SQUARE, CHERRY HILL CENTER, INC. d/b/a CHERRY HILL MALL, KRAVCO, INC., d/b/a HAMILTON MALL, PRUTAUB JOINT VENTURE, d/b/a THE MALL AT SHORT HILLS, EQUITY PROPERTIES & DEVELOPMENT CO., d/b/a MONMOUTH MALL, KRAVCO, INC., d/b/a QUAKERBRIDGE MALL, ROCKAWAY CENTER ASSOCIATES, d/b/a ROCKAWAY TOWNSQUARE, WOODBRIDGE CENTER, INC., d/b/a WOODRIDGE CENTER, LIVINGSTON MALL VENTURE, d/b/a LIVINGSTON MALL, HARTZ MOUNTAIN INDUSTRIES, INC. d/b/a THE MALL AT MILL CREEK,
Defendants.

Decided: July 25, 1991

Frank Askin, Esq. and Howard D. Moskowitz, Esq.,
Attorneys for Plaintiffs

Joseph Aviv, Esq. and Joann Burn, Esqs.,
Attorneys for Defendants J. M. B. Realty, Inc.
and Prutaub Joint Venture

Curtis L. Michael, Esq.,
Attorney for Defendant Hartz Mountain Industries, Inc.

Anne M. Patterson, Esq.,
Attorney for Defendants Woodbridge Center, Inc.
and Cherry Hill Center, Inc.

Brian H. McMahon, Esq.,
Attorney for Defendant Kravco, Inc.

Ronald Wiss, Esq.,
Attorney for Defendants Livingston Mall Venture
and Rockaway Center Associates

Mark A. Steinberg, Esq.,
Attorney for Defendant Equity Properties
and Development Co.

CIOLINO, A.J.S.C.

The plaintiff, New Jersey Coalition Against War in the Middle East is a non-profit, unincorporated association involved in organizing public opinion and political lobbying activities directed to peace efforts aimed at halting the expansion of hostilities in the Middle East. Nine of the ten defendants may be described generically as regional shopping centers. The tenth defendant may be described as a community shopping center. (See Appendix A - Stipulations as to each malls' description.)

Plaintiffs seek relief in the nature of a permanent, mandatory injunctive order compelling the defendants to grant access to their private property so that an organization such as plaintiff may engage in expressive activity within the confines of a privately owned and enclosed commercial establishment. Plaintiffs argue their right under the New Jersey State Constitution to go into and upon defendants' shopping malls to distribute flyers and handbills discussing their view as to the United States' policy in the Middle East. Plaintiffs predicate this action upon the contention that

private shopping malls in New Jersey have a constitutional obligation to provide a forum for expressive activity.

## APPLICABLE LAW

While counsel have generated volumes of pretrial briefs, they all agree that the applicable and controlling case law in this litigation is State v. Schmid, 84 N.J. 535 (1980).

All counsel have acknowledged that Schmid is determinative. Plaintiffs have at times departed from Schmid and have gone on to argue that shopping malls are the equivalent of the traditional downtown center or town square. Plaintiffs argue that these private property owners are the new town squares and must accommodate the constitutional requirements of free speech and assembly. They argue that they have become quasi public forums.

Plaintiffs' proofs have shown that public transportation, in the form of bus service, begins and ends at some of the malls. They have also shown that in at least one of the malls, police service is provided by the municipality. Some of the shopping malls employ a mix of private security officers and off duty local police officers for security purposes. The local police officers' presence is one of a uniformed officer with all of the necessary equipment attendant to police duties. None of the proofs reveal that the other functions of government such as municipal buildings, police stations, post offices, etc. appear in these private shopping mall settings. Proofs do reveal large concentrations of retail establishments. Department stores and individual retail establishments cause the congregation of large populations of people. Accepting and acknowledging all of the aforementioned proofs, I am of the opinion that they do not even begin to approach the necessary requirements of the First Amendment to the U. S. Constitution as set forth in the decision Lloyd Corp. v. Tanner, 407 U.S. 551, 336 L.Ed.2d 131. 92 S.Ct. 2219 (1972); Marsh v. Alabama, 326 U.S. 501, 90 L.Ed. 265, 66 S.Ct. 276 (1946). In his summation counsel for the plaintiff tacitly admits that the central issue in this litigation is not whether these shopping malls are public forums or town squares. Instead, he

states, the issue is whether or not they meet the three prong test of Schmid and the requirements of the N.J. Constitution. Justice Handler states, "The United States Supreme Court has recently acknowledged in the most clear and unmistakable terms that a state's organic and general law can independently furnish a basis for protecting individual rights of speech and assembly. Prune Yard Shopping Center v. Robins, supra 447 U.S. at 80-81, 100 S.Ct. at 2040, 64 L. Ed. 2d at 752." Schmid, supra at 553.

Continuing with his discussion of the applicability of the State Constitution in this setting in Schmid, Justice Handler states:

> We conclude, therefore, that the State Constitution furnishes to individuals the complementary freedoms of speech and assembly and protects the reasonable exercise of those rights. These guarantees extend directly to governmental entities as well as to persons exercising governmental powers. They are also available against unreasonably restrictive or oppressive conduct on the part of private entities that have otherwise assumed a constitutional obligation not to abridge the individual exercise of such freedoms because of the public use of their property. The State Constitution in this fashion serves to thwart inhibitory actions which unreasonably frustrate, infringe, or obstruct the expressional and associational rights of individuals exercised under Article I, paragraphs 6 and 18 thereof.
>
> ...This question brings us to the heart of the problem - the need to balance within a constitutional framework legitimate interests in private property with individual freedoms of speech and assembly.
>
> In the comparable federal setting, private property not used by the public or made available for public use does not ordinarily become subject directly to restrictions in favor of the public. Hynes v. Oradell, 425 U.S. 610, 619-620, 96 S.Ct. 1755, 1760, 48 L.Ed.2d 243, 252 (1976). Moreover, private property does not 'lose its

private character merely because the public is generally invited to use it for designated purposes.' Lloyd Corp. v. Tanner, supra, 407 U.S. at 569, 92 S.Ct at 2229, 33 L.Ed.2d at 143. See PruneYard Shopping Center v. Robins, supra, 447 U.S. at 82, 100 S.Ct. at 2041, 64 L.Ed.2d. at 752; Hudgens v. NLRB, supra, 424 U.S. at 519-520, 96 S.Ct. at 1036, 47 L.Ed.2d. at 206-207. Nevertheless, as private property becomes, on a sliding scale, committed either more or less to public use and enjoyment, there is actuated, in effect, a counterbalancing between expressional and property rights. Marsh v. Alabama, supra, 326 U.S. at 506, 66 S.Ct. at 278, 90 L.Ed at 268.

There is a parallel under our State Constitution. The state constitution equipoise between expressional rights and property rights must be similarly gauged on a scale measuring the nature and extent of the public's use of such property. Thus, even as against the exercise of important rights of speech, assembly, petition and the like, private property itself remains protected under due process standards from untoward interference with or confiscatory restrictions upon its reasonable use. Robins v. PruneYard Shopping Center, supra, 23 Cal.3d at 910-911, 592 P.2d at 347-348, 153 Cal.Rptr. at 860-861; see King v. South Jersey Nat'l Bank, supra, 66 N.J. at 175. The constitutional protection of private property against undue interference or 'taking' is secured by our own Constitution. N.J. Const. (1947), Art. I, pars. 1 and 20. Id. at 561.

Thereafter the Schmid Court cautions that a balance must be struck between the private property owners' rights and the expressional freedoms of others upon the private property. It further instructs this Court as to the three-prong test which must be applied to ascertain the parameters of the rights of speech and assembly upon privately-owned property and the extent to which such property reasonably can be restricted to accommodate these

rights. The three prong test is enunciated at page 563 of Schmid. The Court held:

> . . .that under the State Constitution, the test to be applied to ascertain the parameters of the rights of speech and assembly upon privately owned property and the extent to which such property reasonably can be restricted to accommodate these rights involves several elements. This standard must take into account (1) the nature, purposes, and primary use of such private property, generally, its 'normal' use, (2) the extent and nature of the public's invitation to use that property, and (3) the purpose of the expressional activity undertaken upon such property in relation to both the private and public use of the property. This is a multi-faceted test which must be applied to ascertain whether in a given case owners of private property may be required to permit, subject to suitable restrictions, the reasonable exercise by individuals of the constitutional freedoms of speech and assembly.

## APPLICATION OF SCHMID STANDARD TO THE FACTS

1. **What is the nature, purpose and primary use of the private property involved in this litigation, generally its "normal" use?**

It is this court's opinion that that question may be answered unequivocally. The nature, purpose and primary use of the malls is commercial. The shopping malls are retail establishments, constructed, designed and maintained to do business and make a profit. I did not hear one fact at trial which controverts or contradicts this finding. The plaintiff offered no proofs which will lead this Court to any other conclusion. The evidence and proofs offered by each of the defendants' various witnesses, i.e., mall managers, architect familiar with the design and operation of enclosed shopping malls, planners and representatives of the malls' ownership and/or management all testified that the

purpose of the malls' design and operation was to maximize sales and increase profits and thereby increase rentals. I find from all of the credible evidence which has been offered at this trial that each of these ten malls has dedicated its facilities and property to its primary purpose, that is, business and commercial ventures.

At trial, the plaintiffs offered the testimony of an expert witness qualified as a professional planner. This witness opined that since World War II, there had developed entities known as shopping malls. Prior to World War II, there were central places such as villages and cities with central business districts commonly known as "downtown." The witness described a central business district as an area of concentrated activity and population with stores, walkways, common areas, parking areas and public transportation.

It was this witness's opinion that the defendant shopping malls have assumed the characteristics of a central business district, that is, they have replaced the former central business districts of pre-World War II. This opinion was offered even though the witness acknowledged that shopping malls are designed to encourage people to remain there and shop, thus furthering the malls commercial goals. I do not accept this witness's description as sufficient reasoning necessary for plaintiffs to meet the first prong of the Schmid test.

2. **The extent and nature of the public's invitation to use this property.**

As I have already found, each of the defendant shopping malls has as its purpose a commercial endeavor. They are not, however, to be treated as a single entity as the plaintiffs have urged. Each of them is different and distinct. The Mall at Short Hills and Riverside Square have common ownership and management. The Cherry Hill Mall and Woodbridge Center are owned and operated by another entity. Hamilton Mall and Quakerbridge Mall are owned and operated by a third entity. A fourth and distinct entity is the owner and manager of the Monmouth Mall. The Rockaway Town Square and the Livingston Mall are owned by separate and distinct entities and so is the Mall at Mill Creek.

All of the malls with the exception of the Mall at Mill Creek are defined as "regional centers".

The 1991 Directory of Shopping Centers in the United States defines a regional center as follows: "Provides shopping goods, general merchandise, apparel, furniture and home furnishings in full depth and variety. It is built around the full-line department store with a minimum (gross leasable area) of 100,000 square feet, as the major drawing power. For even greater comparative shopping, two, three or more department stores may be included. In theory, a regional center has a GLA of 400,000 square feet and can range from 300,000 to more than 1,000,000 square feet."

The Mall at Mill Creek is a community shopping center and it is described in the Directory of Shopping Centers as follows: "A community mall has a wider range of facilities for the sale of soft lines (apparel), hard lines (hardware, appliances, etc.) than the neighborhood center. It is built around a junior department store, variety store or discount department store as the major tenant in addition to a supermarket. It does not have a full line department store. The typical size of a community center is 150,000 square feet. In practice, a community center can range from 100,000 to 300,000 square feet. A community center is an intermediate shopping center and is the most difficult to estimate for size and pulling power."

There has been stipulated into evidence and attached to this opinion as an Appendix B, a list of all activities to which the public has been invited to in each of the defendant shopping malls. While testimony has been offered by the plaintiffs as to the extent and nature of the public's invitation to use the malls, particularly to walk for exercise, to browse, to attend promotional events, to dine, to congregate or to just sit about the malls, I find from the credible evidence that the primary purpose of each and every one of the activities listed on the attached Appendix B is to draw people to the mall and thereby maximize sales and increase profits. The malls have been designed to help customers focus upon the stores and the products contained in each of them. They are designed and managed to induce impulse buying which has

been described by several of the witnesses as extremely important to the "lifeblood" of the shopping center. The anchor stores at either end of the mall, the common areas, landscaping and benches are all arranged to provide comfort and convenience for the prospective shopper.

All the common areas and walkways throughout these malls, are subject to maintenance charges imposed upon each of the tenants. The tenants' use of these common areas is restricted except in the event of a mall sponsored promotion or event. The plaintiffs espouse a proposition which would make the common areas open to the public. They assert that except for reasonable restrictions which might be placed upon them, the public should be free to conduct the activities which plaintiffs propose in this litigation. From the credible evidence offered by the defendants, that is, the testimony of the mall managers, designers and planners, I find that the public's invitation to each of the defendant malls is for the purpose of the owners' and tenants' business and does not extend to the activities of leafletting or the distribution of literature.

3. **The purpose of the expressional activity undertaken upon such property in relationship to both the private and public uses of the property.**

Each of the defendant malls has a policy concerning outside use of the mall facilities. I accept the testimony of the defendant mall managers as credible and uncontroverted that the activities which are promotional in nature and sponsored by the mall are done to promote sales. Further, the events conducted in common areas and described as income producing events such as boat and car shows are also sponsored for the purpose of increasing income and attracting customers or potential customers to the mall. Events described as customer-enhancement events such as Boy Scout sponsored events, Easter Bunny, Santa Claus, holiday events are all calculated to attract customers to the mall and to increase customer base. The events which are community oriented are performed and conducted by the malls to garner community goodwill and to display themselves as good corporate

citizens. All of the above-described events are addressed to the ultimate goal of increasing sales and attracting customers.

There has been no testimony or proofs offered that any of the defendant malls permit free and unfettered access and/or activities to their mall premises whether it be in the interior common areas, on the sidewalks surrounding the mall buildings or in the parking lots which are adjacent to the mall premises. The credible testimony offered by the defendants indicates that activities which are perceived by mall management to be controversial in nature or confrontational are not permitted. Effectively, every effort is made to avoid two-sided issues. Specifically outside activities of either a religious or a political nature are avoided. This Court does not accept the opinion of plaintiffs' expert that the mall has replaced the central business district or the townsquare, nor does this Court accept the plaintiffs' position that all malls, particularly enclosed shopping malls are to be treated generically and uniformly. In applying the balance between the protections to be accorded private property and those to be given to expressional freedoms exercised upon such property a factual analysis of each case must be made. The burden of proof is upon the plaintiff and that burden of proof is individual and unique as to each of the defendants named. This Court is of the opinion that the plaintiff has failed in that burden.

The Court is compelled to examine the facts as to the nature, purpose and primary use of the private property, the extent and nature of the public's invitation to use that property and finally the purpose of the expressional activity undertaken upon such property in relation to both the private and public use of the property. As a result of judgments made by the owners and operators of each of the malls and policies which they have established, each has embarked upon a program as to how to best manage their property and conduct their business. The plaintiffs have not met their burden of proving that their activities are not discordant with both the public and private uses to which these shopping malls are dedicated.

For each of the reasons set forth aforesaid, judgment is entered on behalf of each defendant and against the plaintiffs of

no cause for action. Judgment is entered on behalf of the plaintiff as against the defendants Prutaub Joint Venture and JMB Income Property, Ltd-XI on these defendants' Counterclaim of no cause for action.

Judgment is entered without costs.

Plaintiff shall prepare the necessary Order.

## APPENDIX A - MALLS' DESCRIPTIONS

### CHERRY HILL CENTER, INC.

Cherry Hill Center is a regional shopping center situated on 95 acres of land, located at the intersection of Route 38 and Haddonfield Road in Cherry Hill, New Jersey. It is the largest shopping center in southern New Jersey. Cherry Hill Center has three department stores, approximately 27 restaurants and other food establishments, and more than 150 other tenants, including two bank branches, several optical centers, two travel agencies, several hair salons, clothing stores, home furnishing stores, jewelry stores, gift shops, book stores, six doctors' offices, an insurance agency, an automotive center, a gas station, and a leisure and entertainment center. Cherry Hill Center is a fully enclosed shopping center with two levels in one of its wings, and one level in other portions of the Center, and approximately 6000 parking spaces. Approximately 173,000 square feet of Cherry Hill Center's space consists of interior common area. There are eight customer entrances to the common areas of the Center.

### WOODBRIDGE CENTER, INC.

Woodbridge Center is a regional shopping center situated on 145 acres of land, located at the intersection of the Garden State Parkway, the New Jersey Turnpike, Route 1 and Route 9 in Woodbridge, New Jersey. Woodbridge Center has five department stores, 29 restaurants and other food establishments, and more than 210 other tenants, including two bank branches, three opticians, a travel agency, a hair salon, approximately 80 clothing stores, home furnishing stores, jewelry stores, gift shops, and book stores. Woodbridge Center is a fully enclosed shopping center with two levels and 9000 parking spaces. Approximately 273,000 square feet of Woodbridge Center's space consists of interior common area. There are three customer entrances to the common areas of the Center, all of which are near sidewalks. Benches are provided in various locations throughout Woodbridge Center. Shrubbery and plants are located throughout the Center in certain areas as part of the decor of the Center. Benches are provided so that visitors may sit and relax during their visits to the Center.

Visitors to the Center, whether or not they are currently shopping, are permitted to sit on the benches provided that they do not disrupt traffic or disturb other customers or tenants.

## LIVINGSTON MALL

Livingston Mall is a regional shopping center situated on 69 acres of land, located at the intersection of Eisenhower Parkway and South Orange Avenue in Livingston, New Jersey. Livingston Mall is privately owned real property which is currently owned by Livingston Mall Venture, a partnership. Corporate Property Investors (CPI) is a partner in Livingston Mall Venture. Livingston Mall has one hundred sixteen (116) tenants, including three (3) department stores, and fifteen (15) restaurants/food establishments. Other tenants include book and card stores, amusements, hair salons, a bank, a finance company, several jewelers, clothing, footwear and other specialty stores, a drug store and an optical center. The Mall does not possess a post office, movie theater, auditorium, chapel or any other non-commercial establishment. Livingston Mall is a fully enclosed shopping center with two (2) levels and approximately 5500 parking spaces. Approximately 100,000 square feet of the mall are designated as common area. There are five (5) main public entrances to the mall interspersed along the mall's perimeter sidewalk, in addition to the entrances through the department stores.

## ROCKAWAY TOWNSQUARE MALL

Rockaway Townsquare is a regional shopping center situated on 238 acres of land, located at I-80 and Mount Hope Avenue in Rockaway Township, New Jersey. Rockaway Townsquare has one hundred sixty-seven tenants, including four (4) department stores, eighteen (18) restaurants, food establishments, clothing and footwear stores, nine (9) jewelers, three (3) haircutters, electronics stores, books, cards, gifts, specialty shops, three (3) optical centers, two (2) banks, a travel agency, a drug store and a multi-screen theater. There are two levels surrounding a common walkway. Additionally, a second grouping of retail stores is separated from the main Mall enclosure but is not technically considered as "Rockaway Townsquare." Rockaway Townsquare

is a fully enclosed shopping center with two levels and over 6600 parking spaces. Approximately 290,000 square feet of the mall are designated as common area. There are six (6) main public entrances to the enclosed mall interspersed along the mall's perimeter sidewalk, in addition to the entrances through the department stores. The Mall is completely surrounded by a sidewalk, and surrounding that sidewalk is a parking lot, all of which is wholly located on the mall's property. There are no public streets or walkways between the parking areas and bus stops and the enclosed mall. The mall does not contain separate rental rooms or auditoriums for meetings; nor does it possess a chapel. There are single and double benches and landscaped planters scattered throughout the common areas of the mall. Benches are provided as rest and relaxation areas for visitors. Persons who are not shopping are permitted to use the benches as long as they are not disruptive.

## MONMOUTH MALL

Monmouth Mall is a regional shopping center situated on 104 acres of land, located on Routes 35 and 36 and Wyckoff Road, in Eatontown, New Jersey. Monmouth Mall has four (4) department stores, fourteen (14) restaurants and food establishments, and over 120 other specialty stores including a bank branch, an optometrist's office, hair salons, clothing and apparel stores, home furnishing stores, jewelry stores, gift shops, book stores, several smaller "outbuildings" which house mall tenants, a senior citizen activity network office, and, up until a year ago, a United States Post Office Sub Station. Monmouth Mall is a fully enclosed shopping center with three (3) levels and 8200 parking spaces. Approximately 96,218 square feet of the mall are designated as common areas. There are eleven (11) entrances to the enclosed mall interspersed along the mall's perimeter sidewalk. There are single and double benches, and landscaped planters scattered throughout the common areas of the mall. Benches are provided as rest and relaxation areas for visitors. Persons who are not shopping are permitted to use the benches as long as they are not disruptive, even if they are not spending money at the mall.

## THE MALL AT MILL CREEK

The Mall at Mill Creek is a community shopping center situated on approximately twenty-seven (27) acres of land, located off the New Jersey Turnpike exit 16E and Route 3 in Secaucus. The Mall at Mill Creek has a Caldor's, a Foodtown supermarket, a food court consisting of seven (7) restaurants, sixty-two (62) other retail shops including a book store, a bank branch, an optical store, a hair salon, clothing and apparel stores, a jewelry store, a travel agency and gift shops. The Mall at Mill Creek is a fully enclosed shopping center with one level and approximately 1,356 parking spaces. Approximately 47,248 square feet of the Mall are designated as interior common space, of which approximately 34,991 square feet are open to the public. There are three (3) public entrances to the Mall interspersed along the Mall's perimeter sidewalk. In addition, there are three (3) service/fire exit doors to the mall. There is a bench seating area running 27½ lineal feet and another bench seating area running 18½ lineal feet, both located in the common area of the mall. Benches are provided for mall visitors. There are three (3) elevated tree planters roughly four feet by four feet located in the common areas of the mall.

## RIVERSIDE SQUARE SHOPPING CENTER

Riverside Square Shopping Center (Riverside Square) is a regional shopping center situated on 31.44 acres of land, located on Route 4 East at Hackensack Avenue North in Hackensack, New Jersey. Riverside Square has three (3) department stores (one of which is a specialty store), ten restaurants and other food establishments, and over eighty other specialty stores, including an optometrist's office, a travel agency, a hair salon, clothing and apparel stores, home furnishing stores, jewelry stores, gift shops, and a book store. Riverside Square is a fully enclosed shopping center with three (3) levels and 3,075 parking spaces. Approximately 131,287 square feet of the mall are designated as common areas. There are nine (9) entrances to the enclosed mall interspersed along the mall's perimeter sidewalk. Two banks of escalators, one stairway, and one elevator are available for public use to connect the different levels of the mall. There are single and

double benches and landscaped planters placed throughout the common areas of the mall. Benches are provided as rest and relaxation areas for shoppers.

## THE MALL AT SHORT HILLS

The Mall at Short Hills (Short Hills) is a regional shopping center situated on forty-six acres of land, located at the intersection of Route 24 and John F. Kennedy Parkway in Essex County, New Jersey. Short Hills has two (2) department stores, approximately ten food establishments, and approximately 130 other tenants, including two banks, two beauty salons, an optometrist, a shoe repair, drug store, art galleries and two brokerage houses. Short Hills is a fully enclosed shopping center with two (2) levels and five thousand two hundred (5,200) parking spaces. Approximately 148,056 square feet of the mall are designated as common area. There are various benches and various plants scattered throughout the common area. There are benches scattered along the perimeter sidewalk.

## QUAKERBRIDGE MALL

Quakerbridge Mall is a regional retail shopping center situated on 104 acres of land, located at the intersection of Route 1 and Quakerbridge Road in Lawrenceville, New Jersey. Quakerbridge Mall has four anchor stores, fourteen (14) food establishments and more than 120 other tenants including a movie theatre with four (4) screens, three (3) opticians, a bank branch office, a travel agency, a ticketron, jewelers, home furnishing stores, and a wide array of retail clothing shops. Quakerbridge Mall is a privately-owned, fully enclosed shopping center with two (2) levels comprised of several anchor department stores and smaller stores leased to individual tenants, as well as common areas between the stores that are maintained by the mall owners through maintenance fees paid, in part, by the mall's tenants through common are [sic] maintenance charges. Approximately 121,256 square feet of the interior mall are designed as common areas. There are four entrances to the enclosed mall. There are benches, plants and trees in various locations throughout the common area of the Quakerbridge Mall. Benches are provided for

the comfort and convenience of persons at the mall. Individuals who are not currently shopping are permitted to use the benches provided that they are not disruptive, and do not interfere with the flow of pedestrian traffic. Loitering for extended periods of time is not allowed and is discouraged.

## HAMILTON MALL

Hamilton Mall is a regional retail shopping center situated on 104 acres of land, located at the intersection of Black Horse Pike and Pomona Road in Mays Landing, New Jersey. Hamilton Mall has three (3) anchor stores, twelve (12) food establishments, and more than 130 other tenants including a travel agency, a hair salon, a testing center, jewelers, home furnishing stores and a wide array of retail clothing shops. Hamilton Mall is a privately-owned, fully enclosed shopping center with two (2) levels comprised of several anchor department stores and smaller stores leased to individual tenants, as well as common areas between the stores that are maintained by the mall owners through maintenance fees paid, in part, by the mall's tenants through common area maintenance charges. Approximately 135,000 square feet of the interior mall are designed as common areas. There are four entrances to the enclosed mall. There are benches and planters in various locations throughout the common area of the Hamilton Mall. Benches are provided for the comfort and convenience of persons at the mall. Individuals who are not currently shopping are permitted to use the benches provided that they are not disruptive, and do not interfere with the flow of pedestrian traffic. There are signs posted stating that loitering is prohibited.

## APPENDIX B - LIST OF EVENTS

## CHERRY HILL CENTER, INC.

Cherry Hill Center sponsored the following public events which were open to Center patrons and other members of the public without admission charge, in the Center's common areas during 1990:

Bell Canto Opera Competition
Spring Fashion Show
Easter Bunny Arrival
Global ReLeaf Tree Seedling Giveaway
Bugs Bunny 50th Anniversary Show
Mickey Mouse Meet and Greet
Back Yard Circus
Fall Fashion Show
Trick or Treat at the Mall
Santa's Arrival
Senior Citizen Thanksgiving Dinner
Breakfast with Santa
Holiday Musical Performers
Mall Walkers Blood Pressure Screening
Mall Walkers 5th Anniversary Salute
Hadassah Holiday Gift Wrap
Toys for Tots
Visit Santa Claus
Singing Santa for the Hearing Impaired
Grand Re-Opening with the New Jersey Pops
Fashion Spectacular
Snoopy's Greatest Adventures
The Jones New York Collection
Concert by the New Jersey Youth Symphony
Voter Registration Campaign

## WOODBRIDGE CENTER

Woodbridge Center sponsored the following public events which were open to Center patrons and other members of the public without admission charge in the Center's common areas during 1990:

Ice Sculpture event
Hadassah Gift Wrap
Boat and Leisure Living Show
Fashion Show
Bunny Arrival
Pancake Breakfast
New Jersey Youth Symphony
NJAEYC
St. Elizabeth's Hospital Cholesterol Screening
Global ReLeaf Tree Giveaway
Mademoiselle Fashion Show
Vacation Show
Baby Fest
Father's Day Freeze Modeling
New Jersey Pops Concert Series
Mickey and Minnie Breakfast
Muppet Traffic Safety Show
Children's Fashion Show
Newark Museum Workshop
Ninja Turtle Show
Fall Fashion Show
Safe Halloween Parade
Santa's Arrival
Holiday Community Entertainment
1990 Car Show
16th Annual U. S. Marine Corp. Toys for Tots

## LIVINGSTON MALL

Livingston Mall has sponsored the following events at the Mall in 1990 to which the general public was invited without charge:

Boat & Leisure Show
Bridal Fair
Bridal Fashion Show
Spring Fashion Shows
Easter Bunny Visits Mall
Hand Made in America Craft Show
Child ID Day
Prom Fashion Show
Voter Registration Drive
Home Show
Juvenile Diabetes Walk-a-thon
Trick or Treating in the Mall
Santa Arrives
Santa Visits Mall
Story Hours
Holiday Entertainment Programs

## ROCKAWAY TOWNSQUARE

Rockaway Townsquare sponsored the following events at the mall in 1990 to which the general public was invited without charge:

Antique Show
Annual Bridal Festival
Bridal Fashion Event
Boat Show
Spring Fashion Event
Easter Bunny Photos
Cholesterol Screening
Meet & Greet Mickey & Minnie Mouse
Prom Fashion Event
Double Dare Road Show
Jail-a-thon for Cancer
Leisure Living Show

Meet & Greet Bart Simpson
German Band Performance
Back to School Fashions
Fall Fashion Event
Crime Prevention Day
Handmade in America Show
Santa's Arrival Breakfast
Photos with Santa
Choral Groups

## MONMOUTH MALL

Monmouth Mall has sponsored the following events at the mall during 1990 and 1991 to which the public was invited free of charge:

**1990:**

Monmouth County Census Bureau Display
Children's Dental Health Promotion Day
World Gym Aerobics Presentation
Spring Fashion Show
Photos with the Easter Bunny
Freeze Modeling
Spring Community Fair
SummerSidewalk Sale
Fall Fashion Show
Halloween Celebration, With Trick-or-Treating for the Children
Photos with Santa
"Sounds of Christmas" Performances
"Makin Music" Holiday Concert
Piano Recital

**1991:**

4H - Seeing Eye Dog Mall Walk
St. Patrick's Day 5k Run at the Mall
Free "Video Postcards From Home" to the troops in the Gulf Program
Berlin Wall Exhibit
Lighting of the Christmas Tree

Savvy Shopper Sidewalk Sale
Photos of the Easter Bunny
After Hours Savvy Shopper Fashion Show/Cocktail Hour
Halloween at the Mall
Santa Photos Campaign
Santa Entertainment
Spring Fashion Show
July Sidewalk Sale
Fall Fashion Show
Holiday Choral Concerts
Appearance by Soap Opera Character Jackson Montgomery of "All My Children"

**THE MALL AT MILL CREEK**

The following activities of non-profit organizations occurred at The Mall at Mill Creek:

**1989:**

New Jersey Prosecutor's Victim and Witness Association - Information for Crime Victims
Secaucus Recreation Department Art Display
Meadowlands Hospital Medical Center Health Fair
March of Dimes Event
Deborah Hospital Foundation Gift Wrap

**1990:**

American Cancer Society Daffodil Sale
Bradley for U. S. Senate Voter Registration Drive
Fairleigh Dickinson University Information
March of Dimes Information
PSE&G Information
Secaucus Chapter of Deborah Raffle Sale
Secaucus Lions White Cane Drive
U.S. Naval Sea Cadets Recruitment
U.S. Army Recruiting Information
New Jersey Prosecutor's Victims and Witness Association Information disseminated to the public

U.S. Veterans of Foreign Wars Recruiting
Secaucus High School Art Expo
American Cancer Society Jail-A-Thon

The Mall at Mill Creek sponsors a "Merry Milers Mall Walk". Participants in this event have access to the Mall during hours when the Mall shops are not yet open for business as well as during regular business hours. There is no requirement that a person shop at the Mall in order to participate in this event.

## RIVERSIDE SQUARE SHOPPING CENTER

Riverside Square has sponsored the following events over the last two years:

**1989**

Business and Finance Show
Spring Fashion Show
Easter Bunny Show
Spring Events
Spring Kidfest
Springbreak Kidsfest
Home and Garden Show
Working Woman Show
Working Woman Seminar
Bergen County Read-In Festival
5th Annual Dell New Jersey Crossword Open
Summer Concert Series
Back-To-School Series
Fashion Show
8th Annual "Riverside Rapids" Speed Chess Tournament
Home Show
Halloween Kidsfest
Holiday Entertainment (Nov. 29, 1989 - Dec. 21, 1989)
1989 U.S. Marine Corps. Toys for Tots Drop Box

**1990**

Winter Antique Show
"Today's Youth" Art Show
Spring Fashion Show

Earth Day Celebration
Victorian Garden Party
6th Annual Dell New Jersey Crossword Open
Great Outdoors Summer '90 Expo
Summer Antique Show
Music Festival: 5 Mondays (July 1990 - Aug. 1990)
Back-to-School Kidsfest 1990
Fall Career Fashion Show
Great Scotland Festival
9th Annual Invitational Masters Speed Chess Tournament
County Craft Festival
"Picasso of Pumpkins" Show
Haloween Activities Day
Holiday Entertainment (Nov. 28, 1990 - Dec. 24, 1990)

Most of the events took place during regular mall hours but a few occurred when the mall stores were closed and several occurred in The Meeting Room. Riverside Square has a meeting room called "The Meeting Place," s which may be used for a fee by the general public. The Meeting Place can fit up to 150 people and is available for bookings Monday through Fridays from 8 A.M. to 12 noon, 1 P.M. to 5 P.M., and 6 P.M. to 9:30 P.M., and Saturday from 8 A.M. to 12 noon, and 1 P.M. to 5 P.M. All bookings must be made in advance and approved by management.

## SHORT HILLS MALL

Short Hills has sponsored the following events in 1990 and 1991:

Mini Symphony performance of June 4
Morris Nanton Jazz Trio
String Ensemble of June 25
September Fall Concert Series
1. Nelson Riddle Orchestra
2. Tommy Dorsey Orchestra
3. Classical Beethoven and Bach
4. Guitars of Splendor
5. Glenn Miller Orchestra
6. Morris Nanton Jazz Trio

7. Piano Concerto
8. Classical Mozart by mini-symphony
Special Performance of Count Basie Orchestra
Santa Claus
Peter Rabbit Easter program and display
Valentine's Day piano concert series

These events were scheduled during mall hours. The September concert series was held on eight consecutive Sundays from 2 P.M. to 3 P.M.

Short Hills sponsors a fitness walk program, which allows access to the mall before daily business hours, from 7:30 A.M. until 10:00 A.M. The program is sponsored in cooperation with the Morristown Memorial Hospital and open to all members of the public who register in writing and receive a license. Over two hundred people have registered with the mall for the program.

## QUAKERBRIDGE MALL

The Quakerbridge Mall sponsored the following public events at the mall in 1990 to which shoppers and other members of the general public were invited without an admission charge:

Antique Show
January Sidewalk Sale
Colonial Arts Show
Boat Show
Bridal Fair
Interior Design Show
New Car Show
Boy Scouts of America
Home and Garden Show
Antique and Collectibles Show
FFA Floral Design Show
Bunny Arrival
Spring Freeze Modeling
Investment Show
Health and Fitness Show
Iris Sale
Fall Kids Show

Back To Fall Fashion Show
MDA Telethon
Fall Travel Show
Home and Energy Show
Winter Survival Show
Holiday Gifting Show
Holiday Tables Show
Santa's Arrival
Breakfast with Santa

The Quakerbridge Mall had a community day in 1990 where approximately ten non-profit and non-commercial groups, including the American Cancer Society, were present. Each group had its own table located in the common area and was permitted to speak to persons and hand out literature only to persons who approached their tables. No political or religious groups were allowed to participate in community day.

On one occasion, the Quakerbridge Mall allowed representatives of Rider College to come to the mall and set up a tax information table at which visitors' questions about tax matters were answered.

The Muscular Dystrophy Association sponsored a telethon which was held in the common area of the Quakerbridge Mall. A regional phone bank was set up and entertainment was provided. Information about mall activities and tenant shops was provided by the mall.

On one occasion, the Quakerbridge Mall's Merchant's Association and Lawrence Township jointly sponsored an exhibition and display of local municipal groups such as the volunteer fire department and the volunteer emergency medical technicians. No fundraising was conducted.

During the holiday season, choirs sing at the Quakerbridge Mall and provide entertainment.

The Merchant's Association of Quakerbridge Mall sponsors a mall walkers program jointly with a local area hospital. Participation is open to the public. No cost or purchase is necessary. The

mall is opened at 8 A.M. on weekdays and Saturdays for the convenience of tenants and their employees. Members of the mallwalkers program may walk in the mall at this time provided they display a membership button at all times.

## HAMILTON MALL

The Hamilton Mall has sponsored the following public events at the mall in 1990 to which shoppers and other members of the general public were invited without an admission charge:

Winter Clearance Sidewalk Sale
Retirement Show and Band performance
Valentine's Celebration/Bridal Fair & Fashion Show
Colonial Arts Show
Spring Home and Garden Show
Atlantic City Magazine Restaurant Gala Fashion Show
Easter Bunny Arrival Parade and Spring Freeze Modeling
Your Cholesterol Counts
Day Of The Young Child
Auto Show
Showcase of Services
Women of the 90's Show
RNS Mother's Day Celebration
Arts and Crafts Show
Master Artists Tour
Toys For Dads
Rose Show
Antique Show/Father's Day Event
Informal Modeling At The Atlantic City Race Course
Hamilton Mall Night At The Races
The Artie Shaw Band Performance and Mallwalker Club Reception
ACC Day At The Mall
Key To Success Seminar
Health To You Show
TV 40 Grand Prize Drawing
Key To Success Phase II Awards
Boat Show
Toddler Tryouts

Fall Home Show
4-H Day At The Mall
1991 Auto Preview
Halloween Trick or Treat and Costume Contest
Orchid Society Show
Santa's Arrival
Coastal Cops Celebration Holiday
Holiday Fashion Extravaganza
WKTU Charity Day
Shopper Service Day

After complying with every requirement set forth in the guidelines for non-commercial activity, the Kiwanis and Girl Scouts were permitted to use the Community Booth at the Hamilton Mall in a manner consistent with the mall's policies. A non-partisan voter registration drive was held on consecutive Saturdays in September 1990 and was sponsored by the Atlantic Area Business and Professional Woman, Inc.

The mall also coordinates with local businesses a program for children ages six to twelve called "Coastal Cops". The activities include a clean-up effort of the area's benches.

Hamilton Mall Merchant's Association sponsors a mall walkers program. Participation is open to the public. No cost or purchase is necessary. The mall is opened as early as 7 A.M. on weekdays and Saturdays for the convenience of tenants and their employees. Members of the mallwalkers program may walk in the mall at this time provided they display a membership button at all times.

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Attorney for Plaintiffs

SUPERIOR COURT
OF NEW JERSEY
CHANCERY DIVISION
BERGEN COUNTY
DOCKET
NO. C-477-90

NEW JERSEY COALITION AGAINST WAR IN THE MIDDLE EAST, SYLVIA ACKELSBERG, and DAVID CLINE,

Plaintiffs,

v.

J.M.B. REALTY CORPORATION, D/B/A RIVERSIDE SQUARE, CHERRY HILL CENTER, INC., D/B/A CHERRY HILL MALL, KRAVCO, INC. D/B/A HAMILTON MALL, PRUTAUB JOINT VENTURE, D/B/A THE MALL AT SHORT HILLS, EQUITY PROPERTIES & DEVELOPMENT CO., D/B/A MONMOUTH MALL, KRAVCO, INC., D/B/A QUAKERBRIDGE MALL, ROCKAWAY CENTER ASSOCIATES, D/B/A ROCKAWAY TOWNSQUARE, WOODBRIDGE CENTER, INC., D/B/A WOODBRIDGE CENTER, LIVINGSTON MALL VENTURE, D/B/A LIVINGSTON MALL, and HARTZ MOUNTAIN INDUSTRIES, INC., D/B/A THE MALL AT MILL CREEK,

Defendants.

Civil Action

ORDER FOR JUDGMENT

This action having come on for trial before the court sitting without a jury on June 3, 4, 5, 6, 7, 17, 18, 19, 24, 25 and 26, 1991,

and the court having heard the evidence and the argument of the attorneys for the respective parties and having rendered a written opinion on July 25, 1991,

It is on this 14th day of August, 1991 ordered as follows:

1. Judgment of no cause for action is entered on behalf of each defendant and against plaintiffs;

2. As to the counterclaim asserted by defendants Prutaub Joint Venture and JMB Income Properties, Ltd -- XI, judgment of no cause for action is entered on behalf of plaintiffs and against these defendants;

3. Judgment is entered without costs.

**ORDERED - THAT A COPY OF THIS ORDER IS TO BE SERVED UPON ALL COUNSEL WITHIN 7 DAYS OF THE DATE HEREOF**

PETER CIOLINO, A.J.S.C.

PETER CIOLINO A.J.S.C.

SUPREME COURT OF NEW JERSEY
M-764 September Term 1994
37,153

NEW JERSEY COALITION
AGAINST WAR IN THE MIDDLE
EAST, et al.,
Plaintiffs-Respondents,

v.

J.M.B. REALTY CORPORATION, etc., ORDER
Defendants-Movants,

and

KRAVCO, INC., d/b/a HAMILTON MALL,
Defendants-Respondents.

This matter having been duly presented to the Court, it is ORDERED that the motion for reconsideration of the Court's opinion is denied.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 23rd Day of February, 1995

/s/ Stephen Townsend
CLERK OF THE SUPREME COURT

I hereby certify that the foregoing
is a true copy of the original on file
in my office.

/s/
CLERK OF THE SUPREME COURT
OF NEW JERSEY

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Attorneys for Defendants Prutaub Joint Venture and JMB Income Properties, Ltd. - XI

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|---|---|---|
| NEW JERSEY COALITION AGAINST WAR IN THE MIDDLE EAST, et al., | : | SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION BERGEN COUNTY |
| Plaintiffs, | : | DOCKET NO. C-477-90E |
| v. | : | CIVIL ACTION |
| J.M.B. REALTY CORPORATION, et al., | : | **ANSWER, AFFIRMATIVE DEFENSES, AND COUNTERCLAIM OF DEFENDANT PRUTAUB JOINT VENTURE** |
| Defendants. | : | |

Defendant Prutaub Joint Venture, a New Jersey general partnership whose principal place of business is at 200 East Long Lake Road in Bloomfield Hills, Michigan (hereinafter "Prutaub"), by way of answer to the complaint, says:

1. Prutaub is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 1 of the complaint.

2. Prutaub is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 2 of

the complaint, except that Prutaub denies that shopping centers and malls are "the places where the maximum number of persons can be reached most efficiently and expeditiously on a Saturday in New Jersey."

3-7. Prutaub is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs 3 through 7 of the complaint.

8. Prutaub admits only that The Mall at Short Hills is a large shopping center in Essex County, it is located at the intersection of Route 24 and the John F. Kennedy Parkway on 46 acres, and it has 160 stores on two levels, with Bloomingdale's and Abraham & Strauss as anchor stores. Prutaub denies the remaining allegations of paragraph 8 of the complaint.

9-17. Prutaub is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs 9 through 17 of the complaint.

18. Prutaub denies the allegations of paragraph 18 of the complaint.

19-27. Prutaub is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs 19 through 27 of the complaint.

28. Prutaub denies the allegations of paragraph 28 of the complaint.

29-34. Prutaub is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs 29 through 34 of the complaint.

35. Prutaub is without knowledge or information sufficient to form a belief as to the truth of the allegation that "[p]laintiffs and their associates wish to distribute literature opposing the expansion of hostilities in the Middle East." Prutaub denies the remaining allegations of paragraph 35 of the complaint to the extent that those allegations relate to it, and it is without knowledge or information sufficient to form a belief as to the truth of

those allegations to the extent that they relate to the other named defendants.

36. Prutaub denies the allegations of paragraph 36 of the complaint to the extent that those allegations relate to it, and it is without knowledge or information sufficient to form a belief as to the truth of those allegations to the extent that they relate to the other named defendants.

37. Prutaub is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 37 of the complaint.

38. Prutaub denies the allegations of paragraph 38 of the complaint to the extent that those allegations relate to it, and it is without knowledge or information sufficient to form a belief as to the truth of those allegations to the extent that they relate to the other named defendants.

## AFFIRMATIVE DEFENSES

### First Affirmative Defense

The plaintiffs' service of process upon Prutaub was insufficient under the New Jersey Court Rules, 1969.

### Second Affirmative Defense

The complaint fails to state a claim upon which relief against Prutaub can be granted. The plaintiffs have no constitutional right to take and use the private property of The Mall at Short Hills for their own, selfish political purposes.

### Third Affirmative Defense

The plaintiffs' intended acts, under color of law if allowed and required by the courts of this state, will deprive Prutaub of its property without due process of law and will take Prutaub's private property for public use without just compensation, in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

**Fourth Affirmative Defense**

The plaintiffs' intended acts, under color of law if allowed and required by the courts of this state, will take Prutaub's private property for public use without just compensation first made to Prutaub, in violation of article I, paragraphs 1 and 20, of the Constitution of New Jersey (1947).

**Fifth Affirmative Defense**

The plaintiffs' past acts and intended acts are a trespass on the land of Prutaub, after the plaintiffs have been forbidden so to trespass by the agent of Prutaub, in violation of the New Jersey statutes.

WHEREFORE, Prutaub requests an order dismissing the complaint, entering judgment in its favor, and awarding it its attorney's fees and costs of suit.

**COUNTERCLAIM**

Defendant Prutaub Joint Venture, a New Jersey general partnership (hereinafter "Prutaub"), by way of counterclaim against the plaintiffs, says:

**Common Allegations**

1. Prutaub is the owner of a retail shopping center in the Township of Millburn, County of Essex, State of New Jersey, known as The Mall at Short Hills.

2. The Mall at Short Hills consists of a wholly-enclosed mall, two major department stores, and a surrounding parking area, all of which constitute private property within the meaning of the Constitution of the United States, the Constitution of New Jersey (1947), and the New Jersey statutes. Prutaub pays substantial property taxes upon that private property.

3. The enclosed mall of the shopping center is comprised of stores leased to individual tenants, as well as common areas maintained by Prutaub through which shoppers travel from store to store.

4. The Mall at Short Hills is operated by Prutaub in cooperation and subject to reciprocal agreements with the department stores and other tenants at The Mall at Short Hills to function as a single integrated commercial unit; in that connection, Prutaub, the anchor department stores, and the other tenants at The Mall at Short Hills have covenanted and agreed, among other things, that:

a. Prutaub, which constructed the common areas of the wholly-enclosed mall at its own expense, shall maintain those areas.

b. The tenants at The Mall at Short Hills shall pay to Prutaub a charge for "common area maintenance" to maintain the common areas of the mall in the manner described below, including the costs incurred in operating, equipping, lighting, heating, air conditioning, repairing, replacing, and maintaining the common areas.

c. The tenants of The Mall at Short Hills shall not solicit business nor distribute handbills or other advertising matter in the common areas of the mall (including the parking areas) in order to ensure the common areas' attractive, restful, and nondisruptive character to shoppers.

d. Construction of tenant stores and placement of advertising signs shall be subject to architectural and esthetic approval by Prutaub aimed at ensuring that the various designs of merchant storefronts in the mall are in good taste and do not conflict with one another in appearance or detract from the general appearance and attractive character of the shopping center.

5. Prutaub and the anchor department stores at The Mall at Short Hills, through lease agreements, have covenanted and agreed that each department store, with respect to its site, and Prutaub, with respect to the mall and amenities and common areas therein (including the parking area, roadways, sidewalks, and landscaped areas), shall not permit solicitations, the distribution of handbills, other advertising material, or printed or handwritten papers or material of any kind or nature on or about any

part of the common areas and shall use all reasonable means to ensure that the tenants do not permit such conduct.

6. The common areas of the shopping center have been reserved by Prutaub and the tenants at The Mall at Short Hills as areas to be maintained in a manner that enhances retail sales by ensuring that those areas remain attractive, restful, and nondisruptive to shoppers in their travel from store to store.

7. Prutaub has exercised its business judgment and determined that creating and maintaining the common areas of The Mall at Short Hills in the manner described is in the best business interests of The Mall at Short Hills as a whole and of the tenants individually as it fosters an atmosphere that is restful, attractive, and nondisruptive to shoppers, making their visit to The Mall at Short Hills more enjoyable, recharging their energies while at the mall, and increasing their desire to return to the mall.

8. In order to ensure that these business and property interests are protected, Prutaub has adopted a strict trespass policy prohibiting any activity in The Mall at Short Hills that is not directly related to the enhancement of commercial retail sales in the shopping center, which policy the tenants at The Mall at Short Hills rely upon and expect Prutaub to enforce, and which policy, by way of example, prohibits soliciting, petitioning, securing signatures, speech making, and distributing handbills and like activity.

9. Prutaub issues a limited invitation to the public to come to The Mall at Short Hills for the sole reason of patronizing the stores inside the mall.

10. The plaintiffs have stated that they seek to distribute handbills, gather signatures on petitions, and hold public meetings and similar activities inside The Mall at Short Hills directed to generating discussion and activity supporting the plaintiffs' political views.

11. On and previous to October 30, 1990, Prutaub informed representatives of the plaintiff organization of Prutaub's policy prohibiting any activity on the private property of The Mall at

Short Hills that is not directly related to the enhancement of the commercial retail sales of the shopping center, which policy is uniformly applied to all persons and groups regardless of political persuasion.

12. The plaintiffs have petitioned the courts of this state to grant them the forced right to enter Prutaub's private property for the purpose of distributing political handbills to customers at the mall, gathering signatures on petitions, and holding public meetings and similar activities inside the mall directed to generating discussion and activity promoting the plaintiffs' political views but in no way connected to the retail operations of the shops at The Mall at Short Hills.

**Count I**

13. Prutaub adopts and incorporates herein by this reference the allegations contained in paragraphs 1 through 12, above.

14. The plaintiffs' intended acts, under color of law if allowed and required by the courts of this state, will deprive Prutaub of its property without due process of law and will take Prutaub's private property for public use without just compensation, in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States, in that Prutaub will be deprived of (a) its right, essential to its business, to exclude from its property persons whose conduct conflicts with Prutaub's limited invitation to the public and with Prutaub's trespass policy, (b) its reasonable, investment-backed expectation of profit from the patronage by undisturbed and undisrupted customers of the stores in The Mall at Short Hills, and (c) its right to control the use of the private, common areas of the mall in a manner that maximizes the profitability of The Mall at Short Hills.

**Count II**

15. Prutaub adopts and incorporates herein by this reference the allegations contained in paragraphs 1 through 12, above.

16. The plaintiffs' intended acts, under color of law if allowed and required by the courts of this state, will take Prutaub's private property for public use without just compensation first

made to Prutaub, in violation of article I, paragraphs 1 and 20, of the Constitution of New Jersey (1947), in that Prutaub will be deprived of (a) its right, essential to its business, to exclude from its property persons whose conduct conflicts with Prutaub's limited invitation to the public and with Prutaub's trespass policy, (b) its reasonable, investment-backed expectation of profit from the patronage by undisturbed and undisrupted customers of the stores in The Mall at Short Hills, and (c) its right to control the use of the private, common areas of the mall in a manner that maximizes the profitability of The Mall at Short Hills.

**Count III**

17. Prutaub adopts and incorporates herein by this reference the allegations contained in paragraphs 1 through 12, above.

18. The plaintiffs' acts and intended acts constitute and will constitute a trespass within the meaning of the New Jersey statutes and a continuing wrongful civil trespass on Prutaub's private property.

WHEREFORE, Prutaub requests a judgment:

A. declaring that The Mall at Short Hills is the private property of Prutaub, which property is protected from uninvited interference from the plaintiffs;

B. declaring that the distribution of political handbills, gathering signatures, and holding public meetings and similar activities for political purposes in violation of Prutaub's trespass policy and without the express invitation or written consent of Prutaub, if allowed and required by the courts of this state, is a deprivation of property without due process of law and is a taking of Prutaub's private property for public use without just compensation in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States;

C. declaring that the distribution of political handbills, gathering signatures, and holding public meetings and similar activities for political purposes in violation of Prutaub's trespass policy and without the express invitation or written consent of Prutaub, if allowed and required by the courts of this state, is a taking of

Prutaub's private property for public use without just compensation first made to Prutaub in violation of article I, paragraphs 1 and 20, of the Constitution of New Jersey (1947);

D. declaring that the distribution of political handbills, gathering signatures, and holding public meetings and similar activities for political purposes in violation of Prutaub's trespass policy and without the express invitation or written consent of Prutaub is a trespass within the meaning of the New Jersey statutes and a continuing wrongful civil trespass on Prutaub's private property;

E. enjoining, interlocutorily and permanently, the plaintiffs, their officers, agents, employees, and attorneys, and those persons in active concert or participation with them, from distributing handbills or other matter, soliciting funds, gathering signatures on petitions, and holding public meetings and similar activities on the private property of The Mall at Short Hills for purposes in violation of Prutaub's trespass policy;

F. awarding Prutaub compensatory and punitive damages for the plaintiffs' interference with the Federal and state constitutional rights of Prutaub and for the plaintiffs' continuing wrongful civil trespass on Prutaub's private property; and

G. awarding Prutaub its costs, including attorney's fees, and such other and further relief as the Court deems just and proper.

CUYLER, BURK &
MATTHEWS
Attorneys for Defendants
Prutaub Joint Venture
and JMB Income
Properties, Ltd. - XI

By: /s/ Jo Ann Burk
Jo Ann Burk

MIRO MIRO & WEINER
Attorneys for Defendants
Prutaub Joint Venture
and JMB Income
Properties, Ltd. - XI

By: /s/ Joseph Aviv
Joseph Aviv

Dated: January 3, 1991.

## CERTIFICATION PURSUANT TO R. 4:5-1.

Defendant Prutaub Joint Venture (hereinafter "Prutaub"), by its attorney, certifies that the matter in controversy is not the subject of any other action pending in any court or of a pending arbitration proceeding, no other action or arbitration proceeding is contemplated by Prutaub, and there is no other party presently known who should be joined in the action.

Dated: January 3, 1991.

/s/ Jo Ann Burk
Jo Ann Burk

## CERTIFICATION PURSUANT TO RULE 4:6-1(c)

I certify that this answer was served within the time allowed by R.4:6.

Dated: January 3, 1991.

/s/ Jo Ann Burk
Jo Ann Burk

## DESIGNATION OF TRIAL COUNSEL

Pursuant to R. 4:25-4, defendant Prutaub Joint Venture designates Joseph Aviv, outside counsel, to try this case.

Dated: January 3, 1991.

/s/ Joseph Aviv
Joseph Aviv

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Attorneys for Defendants Prutaub Joint Venture
and JMB Income Properties, Ltd. - XI

| | | |
|---|---|---|
| NEW JERSEY COALITION AGAINST WAR IN THE MIDDLE EAST, et al., | : | SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION BERGEN COUNTY |
| Plaintiffs, | : | DOCKET NO. C-477-90E |
| v. | : | CIVIL ACTION |
| J.M.B. REALTY CORPORATION, et al., | : | **AMENDED ANSWER, AFFIRMATIVE DEFENSES, AND COUNTERCLAIM OF DEFENDANT PRUTAUB JOINT VENTURE** |
| Defendants. | : | |

Defendant Prutaub Joint Venture, a New Jersey general partnership whose principal place of business is at 200 East Long Lake Road in Bloomfield Hills, Michigan (hereinafter "Prutaub"), by way of answer to the complaint, says:

1. Prutaub is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 1 of the complaint.

2. Prutaub is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 2 of

the complaint, except that Prutaub denies that shopping centers and malls are "the places where the maximum number of persons can be reached most efficiently and expeditiously on a Saturday in New Jersey."

3-7. Prutaub is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs 3 through 7 of the complaint.

8. Prutaub admits only that The Mall at Short Hills is a large shopping center in Essex County, it is located at the intersection of Route 24 and the John F. Kennedy Parkway on 46 acres, and it has 160 stores on two levels, with Bloomingdale's and Abraham & Strauss as anchor stores. Prutaub denies the remaining allegations of paragraph 8 of the complaint.

9-17. Prutaub is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs 9 through 17 of the complaint.

18. Prutaub denies the allegations of paragraph 18 of the complaint.

19-27. Prutaub is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs 19 through 27 of the complaint.

28. Prutaub denies the allegations of paragraph 28 of the complaint.

29-34. Prutaub is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs 29 through 34 of the complaint.

35. Prutaub is without knowledge or information sufficient to form a belief as to the truth of the allegation that "[p]laintiffs and their associates wish to distribute literature opposing the expansion of hostilities in the Middle East." Prutaub denies the remaining allegations of paragraph 35 of the complaint to the extent that those allegations relate to it, and it is without knowledge or information sufficient to form a belief as to the truth of

those allegations to the extent that they relate to the other named defendants.

36. Prutaub denies the allegations of paragraph 36 of the complaint to the extent that those allegations relate to it, and it is without knowledge or information sufficient to form a belief as to the truth of those allegations to the extent that they relate to the other named defendants.

37. Prutaub is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 37 of the complaint.

38. Prutaub denies the allegations of paragraph 38 of the complaint to the extent that those allegations relate to it, and it is without knowledge or information sufficient to form a belief as to the truth of those allegations to the extent that they relate to the other named defendants.

## AFFIRMATIVE DEFENSES

### First Affirmative Defense

The plaintiffs' service of process upon Prutaub was insufficient under the New Jersey Court Rules, 1969.

### Second Affirmative Defense

The complaint fails to state a claim upon which relief against Prutaub can be granted. The plaintiffs have no constitutional right to take and use the private property of The Mall at Short Hills for their own, selfish political purposes.

### Third Affirmative Defense

The plaintiffs' intended acts, under color of law if allowed and required by the courts of this state, will deprive Prutaub of its property without due process of law and will take Prutaub's private property for public use without just compensation, in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

**Fourth Affirmative Defense**

The plaintiffs' intended acts, under color of law if allowed and required by the courts of this state, will abridge the freedoms of speech and belief and of association of Prutaub, in violation of the First and Fourteenth Amendments to the Constitution of the United States.

**Fifth Affirmative Defense**

The plaintiffs' intended acts, under color of law if allowed and required by the courts of this state, will take Prutaub's private property for public use without just compensation first made to Prutaub, in violation of article I, paragraphs 1 and 20, of the Constitution of New Jersey (1947).

**Sixth Affirmative Defense**

The plaintiffs' intended acts, under color of law if allowed and required by the courts of this state, will restrain and abridge the liberty of speech and belief and the freedom of association of Prutaub, in violation of article I, paragraphs 6 and 18, of the Constitution of New Jersey (1947).

**Seventh Affirmative Defense**

The plaintiffs' past acts and intended acts are a trespass on the land of Prutaub, after the plaintiffs have been forbidden so to trespass by the agent of Prutaub, in violation of the New Jersey statutes.

WHEREFORE, Prutaub requests an order dismissing the complaint, entering judgment in its favor, and awarding it its attorney's fees and costs of suit.

## AMENDED COUNTERCLAIM

Defendant Prutaub Joint Venture, a New Jersey general partnership (hereinafter "Prutaub"), by way of counterclaim against the plaintiffs, says:

### Common Allegations

1. Prutaub is the owner of a retail shopping center in the Township of Millburn, County of Essex, State of New Jersey, known as The Mall at Short Hills.

2. The Mall at Short Hills consists of a wholly-enclosed mall, two major department stores, and a surrounding parking area, all of which constitute private property within the meaning of the Constitution of the United States, the Constitution of New Jersey (1947), and the New Jersey statutes. Prutaub pays substantial property taxes upon that private property.

3. The enclosed mall of the shopping center is comprised of stores leased to individual tenants, as well as common areas maintained by Prutaub through which shoppers travel from store to store.

4. The Mall at Short Hills is operated by Prutaub in cooperation and subject to reciprocal agreements with the department stores and other tenants at The Mall at Short Hills to function as a single integrated commercial unit; in that connection, Prutaub, the anchor department stores, and the other tenants at The Mall at Short Hills have covenanted and agreed, among other things, that:

a. Prutaub, which constructed the common areas of the wholly-enclosed mall at its own expense, shall maintain those areas.

b. The tenants at The Mall at Short Hills shall pay to Prutaub a charge for "common area maintenance" to maintain the common areas of the mall in the manner described below, including the costs incurred in operating, equipping, lighting, heating, air conditioning, repairing, replacing, and maintaining the common areas.

c. The tenants of The Mall at Short Hills shall not solicit business nor distribute handbills or other advertising matter in the common areas of the mall (including the parking areas) in order to ensure the common areas' attractive, restful, and nondisruptive character to shoppers.

d. Construction of tenant stores and placement of advertising signs shall be subject to architectural and esthetic approval by Prutaub aimed at ensuring that the various designs of merchant storefronts in the mall are in good taste and do not conflict with one another in appearance or detract from the general appearance and attractive character of the shopping center.

5. Prutaub and the anchor department stores at The Mall at Short Hills, through lease agreements, have covenanted and agreed that each department store, with respect to its site, and Prutaub, with respect to the mall and amenities and common areas therein (including the parking area, roadways, sidewalks, and landscaped areas), shall not permit solicitations, the distribution of handbills, other advertising material, or printed or handwritten papers or material of any kind or nature on or about any part of the common areas and shall use all reasonable means to ensure that the tenants do not permit such conduct.

6. The common areas of the shopping center have been reserved by Prutaub and the tenants at The Mall at Short Hills as areas to be maintained in a manner that enhances retail sales by ensuring that those areas remain attractive, restful, and nondisruptive to shoppers in their travel from store to store.

7. Prutaub has exercised its business judgment and determined that creating and maintaining the common areas of The Mall at Short Hills in the manner described is in the best business interests of The Mall at Short Hills as a whole and of the tenants individually as it fosters an atmosphere that is restful, attractive, and nondisruptive to shoppers, making their visit to The Mall at Short Hills more enjoyable, recharging their energies while at the mall, and increasing their desire to return to the mall.

8. In order to ensure that these business and property interests are protected, Prutaub has adopted a strict trespass policy prohibiting any activity in The Mall at Short Hills that is not directly related to the enhancement of commercial retail sales in the shopping center, which policy the tenants at The Mall at Short Hills rely upon and expect Prutaub to enforce, and which policy, by way of example, prohibits soliciting, petitioning, securing signatures, speech making, and distributing handbills and like activity.

9. Prutaub issues a limited invitation to the public to come to The Mall at Short Hills for the sole reason of patronizing the stores inside the mall.

10. The plaintiffs have stated that they seek to distribute handbills, gather signatures on petitions, and hold public meetings and similar activities inside The Mall at Short Hills directed to generating discussion and activity supporting the plaintiffs' political views.

11. On and previous to October 30, 1990, Prutaub informed representatives of the plaintiff organization of Prutaub's policy prohibiting any activity on the private property of The Mall at Short Hills that is not directly related to the enhancement of the commercial retail sales of the shopping center, which policy is uniformly applied to all persons and groups regardless of political persuasion.

12. The plaintiffs have petitioned the courts of this state to grant them the forced right to enter Prutaub's private property for the purpose of distributing political handbills to customers at the mall, gathering signatures on petitions, and holding public meetings and similar activities inside the mall directed to generating discussion and activity promoting the plaintiffs' political views but in no way connected to the retail operations of the shops at The Mall at Short Hills.

**Count I**

13. Prutaub adopts and incorporates herein by this reference the allegations contained in paragraphs 1 through 12, above.

14. The plaintiffs' intended acts, under color of law if allowed and required by the courts of this state, will deprive Prutaub of its property without due process of law and will take Prutaub's private property for public use without just compensation, in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States, in that Prutaub will be deprived of (a) its right, essential to its business, to exclude from its property persons whose conduct conflicts with Prutaub's limited invitation to the public and with Prutaub's trespass policy, (b) its reasonable, investment-backed expectation of profit from the patronage by undisturbed and undisrupted customers of the stores in The Mall at Short Hills, and (c) its right to control the use of the private, common areas of the mall in a manner that maximizes the profitability of The Mall at Short Hills.

15. The plaintiffs' intended acts, under color of law if allowed and required by the courts of this state, will abridge the freedoms of speech and belief and of association of Prutaub, in violation of the First and Fourteenth Amendments to the Constitution of the United States, in that (a) Prutaub will thus be compelled affirmatively to sponsor or promote particular speech (in this case, the plaintiffs' speech) and to affirm someone else's belief and (b) Prutaub will thus be forced to relinquish its freedom to maintain its own beliefs silently without public disclosure.

**Count II**

16. Prutaub adopts and incorporates herein by this reference the allegations contained in paragraphs 1 through 12, above.

17. The plaintiffs' intended acts, under color of law if allowed and required by the courts of this state, will take Prutaub's private property for public use without just compensation first made to Prutaub, in violation of article I, paragraphs 1 and 20, of the Constitution of New Jersey (1947), in that Prutaub will be

deprived of (a) its right, essential to its business, to exclude from its property persons whose conduct conflicts with Prutaub's limited invitation to the public and with Prutaub's trespass policy, (b) its reasonable, investment-backed expectation of profit from the patronage by undisturbed and undisrupted customers of the stores in The Mall at Short Hills, and (c) its right to control the use of the private, common areas of the mall in a manner that maximizes the profitability of The Mall at Short Hills.

18. The plaintiffs' intended acts, under color of law if allowed and required by the courts of this state, will restrain and abridge the liberty of speech and belief and the freedom of association of Prutaub, in violation of article I, paragraphs 6 and 18, of the Constitution of New Jersey (1947), in that (a) Prutaub will thus be compelled affirmatively to sponsor or promote particular speech (in this case, the plaintiffs' speech) and to affirm someone else's belief and (b) Prutaub will thus be forced to relinquish its freedom to maintain its own beliefs silently without public disclosure.

**Count III**

19. Prutaub adopts and incorporates herein by this reference the allegations contained in paragraphs 1 through 12, above.

20. The plaintiffs' acts and intended acts constitute and will constitute a trespass within the meaning of the New Jersey statutes and a continuing wrongful civil trespass on Prutaub's private property.

WHEREFORE, Prutaub requests a judgment:

A. declaring that The Mall at Short Hills is the private property of Prutaub, which property is protected from urinvited interference from the plaintiffs;

B. declaring that the distribution of political handbills, gathering signatures, and holding public meetings and similar activities for political purposes in violation of Prutaub's trespass policy and without the express invitation or written consent of Prutaub, if allowed and required by the courts of this state, is a deprivation of property without due process of law and is a taking of Prutaub's

private property for public use without just compensation in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States;

C. declaring that the distribution of political handbills, gathering signatures, and holding public meetings and similar activities for political purposes in violation of Prutaub's trespass policy and without the express invitation or written consent of Prutaub, if allowed and required by the courts of this state, is an abridgment of the freedoms of speech and belief and of association of Prutaub in violation of the First and Fourteenth Amendments to the Constitution of the United States;

D. declaring that the distribution of political handbills, gathering signatures, and holding public meetings and similar activities for political purposes in violation of Prutaub's trespass policy and without the express invitation or written consent of Prutaub, if allowed and required by the courts of this state, is a taking of Prutaub's private property for public use without just compensation first made to Prutaub in violation of article I, paragraphs 1 and 20, of the Constitution of New Jersey (1947);

E. declaring that the distribution of political handbills, gathering signatures, and holding public meetings and similar activities for political purposes in violation of Prutaub's trespass policy and without the express invitation or written consent of Prutaub, if allowed and required by the courts of this state, is a restraint and an abridgment of the liberty of speech and belief and the freedom of association of Prutaub in violation of article I, paragraphs 6 and 18, of the Constitution of New Jersey (1947);

F. declaring that the distribution of political handbills, gathering signatures, and holding public meetings and similar activities for political purposes in violation of Prutaub's trespass policy and without the express invitation or written consent of Prutaub is a trespass within the meaning of the New Jersey statutes and a continuing wrongful civil trespass on Prutaub's private property;

G. enjoining, interlocutorily and permanently, the plaintiffs, their officers, agents, employees, and attorneys, and those persons in active concert or participation with them, from distributing

handbills or other matter, soliciting funds, gathering signatures on petitions, and holding public meetings and similar activities on the private property of The Mall at Short Hills for purposes in violation of Prutaub's trespass policy;

H. awarding Prutaub compensatory and punitive damages for the plaintiffs' interference with the Federal and state constitutional rights of Prutaub and for the plaintiffs' continuing wrongful civil trespass on Prutaub's private property; and

I. awarding Prutaub its costs, including attorney's fees, and such other and further relief as the Court deems just and proper.

MIRO MIRO & WEINER
Attorneys for Defendants
Prutaub Joint Venture and
JMB Income Properties,
Ltd. - XI

By: /s/ Joseph Aviv
Joseph Aviv

CUYLER, BURK &
MATTHEWS
Attorneys for Defendants
Prutaub Joint Venture and
JMB Income Properties,
Ltd. - XI

By: /s/ Jo Ann Burk
Jo Ann Burk

Dated: April 15, 1991.

## CERTIFICATION PURSUANT TO R. 4:5-1.

Defendant Prutaub Joint Venture (hereinafter "Prutaub"), by its attorney, certifies that the matter in controversy is not the subject of any other action pending in any court or of a pending arbitration proceeding, no other action or arbitration proceeding is contemplated by Prutaub, and there is no other party presently known who should be joined in the action.

Dated: April 15, 1991.

/s/ Jo Ann Burk
Jo Ann Burk

## CERTIFICATION PURSUANT TO RULE 4:6-1(c)

I certify that this amended answer was served within the time allowed by R. 4:6.

Dated: April 15, 1991.

/s/ Jo Ann Burk
Jo Ann Burk

## DESIGNATION OF TRIAL COUNSEL

Pursuant to R. 4:25-4, defendant Prutaub Joint Venture designates Joseph Aviv, outside counsel, to try this case.

Dated: April 2, 1991.

/s/ Joseph Aviv
Joseph Aviv

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Attorneys for Defendants Prutaub Joint Venture
and JMB Income Properties, Ltd. - XI

| | | |
|---|---|---|
| NEW JERSEY COALITION AGAINST WAR IN THE MIDDLE EAST, et al., | : | SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION BERGEN COUNTY |
| Plaintiffs, | : | DOCKET NO. C-477-90E |
| v. | : | CIVIL ACTION |
| J.M.B. REALTY CORPORATION, et al., | : | STIPULATION OF FACTS |
| Defendants. | : | |

The plaintiffs, by their attorneys, and defendants Prutaub Joint Venture and JMB Income Properties, Ltd. - XI, by their attorneys, stipulate to the following facts:

1. The New Jersey Coalition Against War in the Middle East (the "Coalition"), which is comprised of several dozen organizations with over 25,000 members, engages in political activities, including "distributing educational literature, gathering signatures on petitions addressed to public officials, and holding public meetings and similar activities directed to generating discussion and activity."

2. The Coalition itself does not have formal "members." Instead, "the Coalition works with other organizations and individuals in furtherance of its goals."

3. The Coalition consists of regional groups, state-wide and local organizations, and individuals.

4. Because of the "ad hoc and decentralized nature of the coalition," the Coalition is not aware of all of its constituent organizations' activities.

5. The organizations affiliated with the Coalition have their own political points of view. The Coalition attempts to coordinate activities that promote its program as agreed upon by the individual organizations.

6. The Coalition includes the following organizations: New Jersey Council of Churches, the NJ Rainbow Coalition, SANE/FREEZE, the Baptist Peace Fellowship, NJ Pax Christi, the Coalition for Nuclear Disarmament, Viet Nam Veterans Against the War, Drew University Peacemakers, the Monmouth County Coalition For the Homeless, the Jersey Cape Coalition for Peace and Justice, the NJ Peace Mission, the NJ Pledge of Resistance, the South Jersey Campaign for Peace Justice, and the Womens' International League for Peace & Freedom.

7. The individual organizations affiliated with the Coalition may engage in activities without reporting them to the Coalition.

8. The various organizations within the Coalition have participated in public hearings in Jersey City, teach-ins and public forums at churches and universities, including Princeton University, gatherings at congressional offices, a rally at McGuire Air Force Base, vigils at local hospitals, and two all-day marches in Washington, D.C., in January 1991. The Coalition handed out over 85,000 leaflets during the two weeks preceding November 28, 1990.

9. Prutaub Joint Venture ("Prutaub"), a New Jersey partnership, is the owner of The Mall at Short Hills, a retail shopping center located in Short Hills, New Jersey.

10. JMB Income Properties, Ltd. - XI ("JMB"), an Illinois limited partnership, is the owner of Riverside Square Shopping Center ("Riverside Square"), a retail shopping center located in Hackensack, New Jersey.

11. The Mall at Short Hills is privately-owned, wholly-enclosed shopping mall.

12. Riverside Square is privately-owned, wholly-enclosed shopping mall.

13. The tenants pay through maintenance fees for the security, cleaning, electricity, heating, air conditioning, and upkeep of the common areas in The Mall at Short Hills.

14. The tenants pay through maintenance fees for the security, cleaning, electricity, heating, air conditioning, and upkeep of the common areas in Riverside Square.

15. The owners of The Mall at Short Hills disagree with the plaintiffs' political message.

16. The owners of Riverside Square Shopping Center disagree with the plaintiffs' political message.

17. The written policy of The Mall at Short Hills states:

POLICY ON TRESPASSING

> Any unauthorized activity in the common areas not directly related to the purpose for which The Mall at Short Hills was developed, regardless of whether that activity is conducted by one or more persons and regardless of whether that activity is peaceful or non-peaceful, will be considered unlawful trespassing and it will be treated as such by the owners and the managing agents of The Mall at Short Hills. By way of example, and not to be a complete list, the following are activities which constitute trespassing and will not be permitted: soliciting, speech making, distributing handbills or other literature, seeking signatures on petitions, or taking surveys (or anything else which might be classified as expressive

> activity, exclusive of labor activity expressly permitted by statute). Our policy is based on the United States Supreme Court ruling in the case of Lloyd Corp. v. Tanner, 407 U.S. 551 (1972). The Mall at Short Hills is prepared to take every legal avenue to prevent such trespass and, when required by the police, will prosecute violators to the full extent of the law.

18. The plaintiffs do not contest that The Mall at Short Hills does not allow its common areas to be used for political functions.

19. The plaintiffs do not contest that The Mall at Short Hills does not allow charitable groups to solicit in the common areas of the mall during business hours.

20. The plaintiffs do not contest that the trespass policy of The Mall at Short Hills is applied in a uniform, nondiscriminatory manner to all persons and groups, regardless of political persuasion.

21. On November 10, 1990, the Coalition sent a representative to The Mall at Short Hills, who, without asking prior permission or even advising mall management of her presence, began to distribute literature opposing the possibility of war in the Middle East, including a tear-off coupon for donations of money to be sent in the mail.

22. On November 10, 1990, the Coalition sent representatives to Riverside Square, who, without asking prior permission or even advising mall management of their presence, began to distribute literature opposing the possibility of war in the Middle East, including a tear-off coupon for donations of money to be sent in the mail.

23. The plaintiffs do not contest that The Mall at Short Hills has never allowed partisan political activities on its private property.

24. The plaintiffs do not contest that The Mall at Short Hills security guards do not have the experience, training, or powers that the municipal police have to deal with confrontations.

25. The plaintiffs do not contest that Riverside Square security guards do not have the experience, training, or powers that the municipal police have to deal with confrontations.

| Attorney for Plaintiffs | Attorneys for Defendants Prutaub Joint Venture and JMB Income Properties, Ltd. - XI |
|---|---|
| By: /s/ Frank Askin | By: /s/ Joseph Aviv |
| Frank Askin | |

# MIRO MIRO & WEINER

## Bloomfield Hills, Michigan

## New Jersey Shopping Study

**March 1991**

**Prepared by**
**Scott Ahlstrand, Professional Analyst**
**Selection Research, Inc.**
**Lincoln, Nebraska**

## Introduction

Selection Research, Inc. of Princeton, New Jersey conducted market research for Miro Miro & Weiner, Bloomfield Hills, Michigan. The overall purpose of this market research was to determine the attitudes of individuals who go to shopping malls at least once a month toward the presence of certain groups and activities at those shopping malls.

## Methodology

To accomplish the objectives of this study, Selection Research, Inc. interviewed a random sample of 502 respondents across the state of New Jersey. The sample was chosen randomly from a regionally stratified proportion of the population. Qualified respondents for this study were:

- age 18 or older
- lived in the state of New Jersey
- did not work for or did not have anyone in their household work for a shopping mall
- in a typical month took at least one trip to a shopping mall in their area

SRI provided experienced, professionally trained interviewers under the exclusive employment of SRI. All interviewers involved in this project were briefed specifically on the objectives and methodology of the study. When the respondent was not available during the first telephone contact, three additional callbacks were made at additional times of the day in an attempt to complete the interview. This callback procedure is a quality control mechanism for maintaining the representativeness of the sample. All field work was validated at the 10% level by supervisory callbacks. Telephone interviews were monitored internally as a part of the ongoing SRI process for evaluating interviewers. All completed questionnaires were edited and coded independently as a quality control measure. Excellent interviewing and data reporting are essential in a project of this nature. Miro Miro & Weiner can be confident that the very best procedures were followed.

## Survey Instrument Development

Questions included in this questionnaire were prepared by Selection Research, Inc. and approved by Miro Miro & Weiner. Miro Miro & Weiner had responsibility for identifying question issues and information desired. SRI had responsibility for ensuring that all items were technically correct and without bias. The questionnaire was field-tested before the final study was initiated. A copy of the questionnaire used in this study can be found in the appendix.

## Stability of Results

At the 95% level of confidence, the maximum expected error range for a sample of 502 respondents is ±4.4%. Stated more simply, if 100 different samples of 502 mall-attending individuals age 18 and older in the state of New Jersey were chosen randomly from a regionally-stratified sample, 95 times out of 100, the results obtained would vary no more than ±4.4 percentage points from the results that would be obtained if the entire mall-attending, 18-year and older population of New Jersey were interviewed.

## Reports Prepared

Miro Miro & Weiner has been provided a complete set of tabular results by frequency and percentage for each of the major classifications. These tabular results should serve as reference material and be consulted before important decisions are made. This narrative report focuses on what are felt to be the most meaningful findings in this study.

**TABLE 1**
**Sample Characteristics**
**(n=502)**

| | Percent |
|---|---|
| Sex | |
| Male | 43% |
| Female | 57 |
| Age | |
| 18-24 | 14% |
| 25-34 | 28 |
| 35-44 | 19 |
| 45-54 | 15 |
| 55-64 | 10 |
| 65 and older | 13 |
| **Mean** | **41.48** |
| Education | |
| Less than high school graduate | 6% |
| High school graduate | 29 |
| Some college | 22 |
| Trade/technical/vocational training | 5 |
| College graduate | 26 |
| Postgraduate work/degree | 11 |
| Income | |
| Under $15,000 | 8% |
| $15,000–$24,999 | 14 |
| $25,000–$34,999 | 14 |
| $35,000–$44,999 | 14 |
| $45,000–$54,999 | 11 |
| $55,000 or more | 28 |
| Don't know | 4 |
| Refused | 7 |
| Race | |
| White | 80% |
| Black | 10 |
| Other | 9 |
| Refused | 1 |

**TABLE 1 (continued)**
**Sample Characteristics**
**(n=502)**

| | Percent |
|---|---|
| Area | |
| A smaller community with a population under 100,000 some distance from a large metropolitan area | 34% |
| The suburbs of a large metropolitan area | 33 |
| A rural area | 16 |
| A large urban area | 14 |
| Other | 1 |
| Don't know | 3 |
| County | |
| Atlantic | 3% |
| Bergen | 11 |
| Burlington | 5 |
| Camden | 7 |
| Cape May | 1 |
| Cumberland | 2 |
| Essex | 11 |
| Gloucester | 3 |
| Hudson | 7 |
| Hunterdon | 1 |
| Mercer | 4 |
| Middlesex | 9 |
| Monmouth | 7 |
| Morris | 6 |
| Ocean | 5 |
| Passaic | 6 |
| Salem | 1 |
| Somerset | 3 |
| Sussex | 2 |
| Union | 6 |
| Warren | 1 |

**"In a typical month, how many trips do you usually take to a shopping mall in your area?"**

**TABLE 2**
**Number of Trips Taken to a Shopping Mall in a Typical Month**
**(n=502)**

| Number | Percent |
|---|---|
| 1 | 22% |
| 2 | 24 |
| 3 | 12 |
| 4 | 18 |
| 5 | 7 |
| 6-10 | 12 |
| 11-15 | 3 |
| 16-20 | * |
| 21 or more | * |
| **Mean** | **4.00 trips** |

* Less than 1% mention

* On average, respondents said they took four trips to a shopping mall in a typical month. However, more than one-half (58%) said they usually took three or fewer trips.
* Those respondents who tended to visit malls most frequently included:
  - 18-34 year olds (4.94)
  - females (4.42)
  - those with household incomes under $35,000 (4.30)

**"Please tell me if you favor or oppose the following groups and activities being allowed in shopping malls in the State of New Jersey."**

**TABLE 3**
**Favor/Oppose Groups/Activities in Shopping Malls in New Jersey**
**(n=502)**

| Group/Activity | % Favor | % Oppose | % Don't know |
|---|---|---|---|
| The solicitation of contributions by Girl Scouts | 77% | 19% | 3% |
| The distribution of information and speeches by the Ku Klux Klan | 10 | 88 | 2 |
| The distribution of information and speeches by anti-war action groups | 33 | 62 | 4 |
| The solicitation of contributions and the distribution of information by various religious groups | 36 | 59 | 4 |
| The handing out of leaflets and pamphlets by gay action groups | 30 | 63 | 6 |

* More than three-fourths (77%) of the respondents favored allowing the solicitation of contributions by Girl Scouts in shopping malls in the state of New Jersey. The majority of respondents, however, opposed allowing the other four tested groups and activities:

  - Distribution of information and speeches by the Klu Klux Klan; distribution of information and speeches by anti-war action groups; solicitation of contributions and the distribution of information by various religious groups; and, handing out of leaflets and pamphlets by gay action groups -- in shopping malls in the state.

* Respondents were particularly opposed to the distribution of information and speeches by the Klu Klux Klan with almost nine-tenths (88%) saying they opposed allowing such activities in shopping malls in the state of New Jersey.

**"WHEN YOU ARE SHOPPING IN A MALL AND YOU COME UPON AN INDIVIDUAL OR GROUP SOLICITING CONTRIBUTIONS OR DISTRIBUTING INFORMATION WHICH OF THE FOLLOWING DO YOU USUALLY DO?" (n=502)**

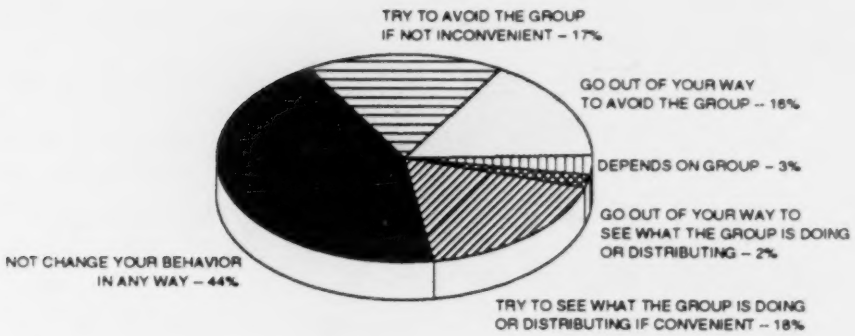


**FIGURE 1**

* One-third (33%) of respondents said they would either go out of their way to avoid a group (16%) or would try to avoid a group if convenient (17%) if they were confronted with a group soliciting contributions or distributing information in a shopping mall.

**"If you came upon the following groups or activities in the mall that you shop at most often, what would you do...?"**

**TABLE 4**
**Reaction to Various Groups/Activities in Mall Where Respondent Shops Most Often (n=502)**

| Group/Activity | % Go out of way to see/ try to see | % Go out of way/try to avoid | Net effect |
|---|---|---|---|
| The solicitation of contributions by Girl Scouts | 45% | 13% | +32% |
| The distribution of information and speeches by the Klu Klux Klan | 5 | 66 | -56 |
| The distribution of information and speeches by anti-war action groups | 18 | 39 | -21 |
| The solicitation of contributions and the distribution of information by various religious groups | 14 | 35 | -21 |
| The handing out of leaflets and pamphlets by gay action groups | 8 | 47 | -39 |

* The presence of four of the five tested groups had a net negative effect (by percent who go out of the way/try to see minus percent who go out of the way/try to avoid) on the mall visiting behavior of the respondents. This negative effect was particularly evident with regard to the Ku Klux Klan (-56% net effect) and gay action groups (-39%).

**"If the following groups or activities were allowed at malls in your area, would you shop more, less or about the same at these malls?"**

**TABLE 5**
**Effect if Various Groups/Activities Were Allowed at Malls in Respondent's Area (n=502)**

| Group/Activity | % Shop more at these malls | % Shop less at these malls | Net effect |
|---|---|---|---|
| The solicitation of contributions by Girl Scouts | 4% | 6% | −2% |
| The distribution of information and speeches by the Ku Klux Klan | 1 | 50 | −49 |
| The distribution of information and speeches by anti-war action groups | 2 | 23 | −21 |
| The solicitation of contributions and the distribution of information by various religious groups | 1 | 19 | −18 |
| The handing out of leaflets and pamphlets by gay action groups | 1 | 28 | −27 |

* All of the five tested groups (and activities) had a net negative effect (percent more minus percent less) on respondents' mall shopping behavior. As was the case with regard to earlier data, the Ku Klux Klan and gay action groups had particular negative effect on respondents' mall shopping behavior.

**"How strongly do you agree with the following statement about shopping at malls:?"**

**TABLE 6**
**Level of Agreement/Disagreement With Statements About Shopping at Malls (n=502)**

| Statements | Mean* | % Strongly Agree/Agree | % Strongly Disagree/ Disagree |
|---|---|---|---|
| You don't want to have to deal with political or religious action groups when you go shopping | 2.96 | 71% | 25% |
| If political or religious action groups were at the malls you shopped at, you would shop less at those malls | 2.47 | 41 | 55 |
| If political or religious action groups were at the malls you shopped at, you would look for other places to shop | 2.50 | 41 | 56 |

* 4=strongly agree, 3=agree, 2=disagree, 1=strongly disagree

* The majority of respondents (71%) said they either strongly agreed (25%) or agreed (46%) that they did not want to have to deal with political or religious action groups when they went shopping.

* Approximately four-tenths (41% in each case) of the respondents strongly agreed or agreed with the following two statements:

- If political or religious action groups were at the malls you shopped at, you would shop less at those malls
- If political or religious action groups were at the malls you shopped at, you would look for other places to shop.

# APPENDIX

# SURVEY INSTRUMENT

**FIELD FINAL - FEBRUARY 22, 1991**

x APPROVED BY CLIENT

DATE_____

Copyright, SRI Research Center, Inc.

INTERVIEWED BY_____

AC948
Project Registration #10314300
**MIRO MIRO & WEINER**

Northern New Jersey Shopping
SRI Research Center, Inc.
Cal Martin/Scott Ahlstrand/
Phil Fitzpatrick, Specwriter
February, 1991 n=500

I.D.#:

0 (1-6)

**AREA CODE AND TELEPHONE NUMBER: ( )_____

___ ___ (32 - 41)

**INTERVIEW TIME:_____

___ ___ (42) (43)

D1. EDUCATION: What is the highest level of education you have completed? (Open ended and code)

1 Less than high school graduate (K-11)
2 High school graduate (12)
3 Some college
4 Trade/Technical/Vocational training
5 College graduate
6 Post-graduate work/Degree
7 (DK)
8 (Refused) 6.10 (47)

D2. RACE: What is your race? Are you white, black, or some other race?

1 White 4 (DK)
2 Black 5 (Refused)
3 Some other 6.20 (48)

D3. INCOME: Is your total annual household income, before taxes, over or under $25,000?

**(If "Under", ask:)** Is it over or under $15,000?

**(If "Over", ask:)** Is it over or under $35,000?

**(If "Over", ask:)** Is it over or under $45,000?

**(DEMOGRAPHICS CONTINUED)**

**(If "Over", ask:)** Is it over or under $55,000?

| | | | |
|---|---|---|---|
| 1 | Under $15,000 | 5 | $45,000 to $54,999 |
| 2 | $15,000 to $24,999 | 6 | $55,000 or more |
| 3 | $25,000 to $34,999 | 7 | (DK) |
| 4 | $35,000 to $44,999 | 8 | (Refused) |

7 (53)

D4. AREA: How would you describe the area in which you live? Is it **(read and rotate 06-09)**?

01 Other (list verbatim)
02 (DK)
03 (Refused)
04 HOLD
05 HOLD
06 A large urban area
07 The suburbs of a large metropolitan area
08 A smaller community with a population under 100,000 some distance from a large metropolitan area
09 A rural area

8.10

(347) (348)

**(VALIDATE PHONE NUMBER AND THANK RESPONDENT)**

Hello, this is _____ with Selection Research, Inc., of Lincoln, Nebraska. Today, we are conducting a brief study with individuals in New Jersey concerning their attitudes and opinions regarding their shopping behavior. May I please speak with the youngest male, 18 years of age or older, who is now at home? **(If "No male," ask:)** May I please speak with the oldest female, 18 years of age or older, who is now at home?

1 Yes, male
2 Yes, female > (Continue)
3 No one available - **(Schedule time for callback)**
4 (Refused) - **(Thank and Terminate)** .20 (44)

S1. AGE: Please tell me how old you are? (Open ended **and code actual age)**

00 (Refused) 99 99+ .30 (45) (46)

S2. COUNTY: What county do you live in? (Open ended **and code last two digits of fips code)**

Atlantic - 001
Bergen - 003
Burlington - 005
Camden - 007
Cape May - 009
Cumberland - 011
Essex - 013
Gloucester - 015
Hudson - 017
Hunterdon - 019
Mercer - 021
Middlesex - 023
Monmouth - 025
Morris - 027
Ocean - 029
Passaic - 031
Salem - 033
Somerset - 035
Sussex - 037
Union - 039
Warren - 041

099 Other/(DK/RF) - **(Thank and Terminate)**

_____ 0 (18) ____ (19) .40 (20)

S3. Do you, or does anyone in your household work for a shopping mall?

| 1 | 2 | |
|---|---|---|
| Yes/(DK/RF) | No | .80 (324) |
| **(Thank & Terminate)** | **(Continue)** | |

S4. In a typical month, how many trips do you usually take to a shopping mall in your area? (Open ended **and code actual number**)

00 None - **(Thank and Terminate)**

97 97+

98 (DK) - **(Continue)**

99 (Refused) - **(Thank and Terminate)**

.90 (325) (326)

---

**(If codes "01-97") in S4, Skip to #1)**

S5. **(If "DK" in S4, ask:)** Would you say you make at least one or more trips to a shopping mall in a typical month, or less than one?

1. One or more - **(Continue)**
2. Less than one
3. (Dk)
4. (Refused)

**(Thank and Terminate)**

.95 (327)

1. Please tell me if you favor (F) or oppose (O) the following groups and activities being allowed in shopping malls in the State of New Jersey. How about **(read and rotate A-E)**?

| | F | O | (DK) | (RF) | |
|---|---|---|---|---|---|
| A. The solicitation of contributions by Girl Scouts | 1 | 2 | 3 | 4 | 1.10 (328) |
| B. The distribution of information and speeches by the Ku Klux Klan | 1 | 2 | 3 | 4 | 1.20 (329) |
| C. The distribution of information and speeches by anti-war action groups | 1 | 2 | 3 | 4 | 1.30 (330) |
| D. The solicitation of contributions and the distribution of information by various religious groups | 1 | 2 | 3 | 4 | 1.40 (331) |
| E. The handing out of leaflets and pamphlets by gay action groups | 1 | 2 | 3 | 4 | 1.50 (332) |

2. When you are shopping in a mall and you come upon an individual or group soliciting contributions or distributing information, which of the following do you usually do? Do you usually **(read 1-5)**?

   1 Go out of your way to avoid the group
   2 Try to avoid the group if not inconvenient
   3 Not change your behavior in any way
   4 Try to see what the group is doing or distributing if convenient
   5 Go out of your way to see what the group is doing or distributing
   6 (Depends on group)
   7 (DK)
   8 (Refused)

   2 (333)

3. If you came upon the following groups or activities in the mall that you shop at most often, what would you do? How about if you come upon **(read and rotate A-E)**? Would you **(read 1-5)**?

   1 Go out of your way to avoid the group
   2 Try to avoid the group if not inconvenient
   3 Not change your behavior in any way
   4 Try to see what the group is doing or distributing if convenient
   5 Go out of your way to see what the group is doing or distributing
   6 (Depends on group)
   7 (DK)
   8 (Refused)

   A. The solicitation of contributions by Girl Scouts:

   _____ 3.10 (334)

B. The distribution of information and speeches by the Ku Klux Klan:

_____ 3.20 (335)

C. The distribution of information and speeches by anti-war action groups:

_____ 3.30 (336)

D. The solicitation of contributions and the distribution of information by various religious groups:

_____ 3.40 (337)

E. The handing out of leaflets and pamphlets by gay action groups:

_____ 3.50 (338)

4. If the following groups or activities were allowed at malls in your area, please tell me if you would shop more (M), less (L), or about the same (AS) at these malls. How about **(read and rotate A-E)**?

| | M | L | AS | (DK) | (RF) | |
|---|---|---|---|---|---|---|
| A. The solicitation of contributions by Girl Scouts | 1 | 2 | 3 | 4 | 5 | 4.10 (339) |
| B. The distribution of information and speeches by the Ku Klux Klan | 1 | 2 | 3 | 4 | 5 | 4.20 (340) |
| C. The distribution of information and speeches by anti-war groups | 1 | 2 | 3 | 4 | 5 | 4.30 (341) |
| D. The solicitation of contributions and the distribution of information by various religious groups | 1 | 2 | 3 | 4 | 5 | 4.40 (342) |
| E. The handing out of leaflets and pamphlets by gay action groups | 1 | 2 | 3 | 4 | 5 | 4.50 (343) |

5. I'm going to read you some statements about shopping at malls. For each one, please tell me if you strongly agree (SA), agree (A), disagree (D), or strongly disagree (SD) with that statement. How about **(read and rotate A-C)**?

| | SA | A | D | SD | (DK) | (RF) | |
|---|---|---|---|---|---|---|---|
| A. You don't want to have to deal with political or religious action groups when you go shopping? | 1 | 2 | 3 | 4 | 5 | 6 | 5.10 (344) |
| B. If political or religious action groups were at the malls you shopped at, you would shop less at those malls | 1 | 2 | 3 | 4 | 5 | 6 | 5.20 (345) |
| C. If political or religious action groups were at the malls you shopped at, you would look for other places to shop | 1 | 2 | 3 | 4 | 5 | 6 | 5.30 (346) |

**(GO TO DEMOGRAPHICS)**

INTERVIEWER I.D. # ____ ____ ____ ____
(241) (242) (243) (244)

Supreme Court, U.S.
FILED
JUL 17 1995
CLERK

(3)

No. 94-1925

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1994

SHORT HILLS ASSOCIATES, f.k.a.
Prutaub Joint Venture, *Petitioner,*

*v.*

NEW JERSEY COALITION AGAINST WAR IN THE MIDDLE EAST, SYLVIA ACKELSBERG, and DAVID CLINE, *et al., Respondents.*

**On Petition for a Writ of Certiorari to the Supreme Court of New Jersey**

## PETITIONER'S SUPPLEMENTAL BRIEF

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BEST AVAILABLE COPY

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## PETITIONER'S SUPPLEMENTAL BRIEF

The petitioner files this supplemental brief under Sup. Ct. R. 15.7 to call the Court's attention to the opinion of the Court in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston,* 63 U.S.L.W. 4625 (U.S. June 19, 1995) (No. 94-749), published after the filing of the petition for a writ of certiorari. [1] In *Hurley,* the issue was "whether Massachusetts may require private citizens who organize a parade to include among the marchers a group imparting a message the organizers do not wish to convey." *Id.* at 4626. The unanimous Court held that "such a mandate violates the First Amendment." *Ibid.* The Court ruled that the state courts' application of the public accommodations statute (Mass. Gen. Laws §272:98) produced an order essentially requiring the private organizers to alter the expressive content of their parade. *Id.* at 4630. This use of the state's power violated "the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Ibid.* A person has the right to "decide 'what not to say,'" *ibid.* (quoting *Pacific Gas & Elect. Co. v. Public Utils. Comm'n of Cal.*, 475 U.S. 1, 16 (1986)), and may remain silent on expressions of opinions or on statements of fact he "would rather avoid." *Ibid.* (citations omitted). The essential relevance of *Hurley* to the present case, then, is this point: whatever the reason, a person has the choice not to propound a particular point of view, and that choice lies "beyond the government's power to control." *Ibid.*

In the present case, the Supreme Court of New Jersey violated this fundamental rule of First Amendment protection: by judicial fiat, it dictated a particular "anti-Iraq war" message on

[1] The petition for a writ of certiorari was docketed on May 23, 1995, as No. 94-1925. The respondents' brief in opposition was due on June 22, 1995. By letter dated June 12, 1995, counsel for the respondents requested of the Chief Deputy Clerk an enlargement of the time to file the opposing brief "[s]ince this case includes an issue related to one involved in Hurley v. Irish American Gays, 94-749, which was argued on April 25 and has not yet been decided." The application to extend time was granted by the Clerk; the time was extended to July 20, 1995.

private property owned by one who disagreed with and opposed the proffered viewpoint. The state supreme court's justification was that "private property owners who have so transformed the life of society for their profit . . . must be held to have relinquished a part of *their* right of free speech." *New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp.*, 138 N.J. 326, 371, 650 A.2d 757, 780 (1994) (4-3 decision).[2] This justification cannot survive this Court's holding in *Hurley*. The owner of The Mall at Short Hills, by its presentation, selection of tenants, and advertising, is engaged in conscious expressive activity that defines the mall to its potential customers and indeed to the world at large. The fact that The Mall at Short Hills is successful and is open to the public is no more dispositive than that the St. Patrick's Day Parade takes place on the public streets of South Boston, including as many as 20,000 marchers and drawing up to 1 million watchers, *see Hurley*, 63 U.S.L.W. at 4626; moreover, in this case, there is no showing comparable to the one made in *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. ____, 114 S.Ct. 2445 (1994), that the speakers will be destroyed in the absence of the challenged law. After all, the respondents here managed to hand out over 85,000 leaflets in places other than shopping centers during the two weeks preceding their application for a temporary restraining order. App. to Pet. for Cert. 142a, ¶8. Nor does the private owner lose First Amendment protection by holding a variety of events, such as concert performances (each of

[2]This justification was based on the majority's *judicial notice* of the "fact" that shopping centers have "displaced the downtown business districts" of New Jersey. *See New Jersey Coalition*, 138 N.J. at 346-47, 650 A.2d at 767-68. But this Court in *Hurley* reiterated that, when it is confronted with the state court's conclusion that the factual characteristics of the petitioner's activity place it outside of First Amendment protection, the Court has "a constitutional duty" to conduct an independent examination of the record as a whole, without deference to the state court, to assure that this judgment does not constitute a forbidden intrusion on the field of free expression. *Hurley*, 63 U.S.L.W. at 4628 (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964)). The record in the present case, developed during 11 days of trial testimony and by stipulations of fact, shows, in fact, that shopping malls have not become the new downtowns of New Jersey, and that activists have better opportunities for leafleting today than ever before.

which is designed to draw targeted customers into the mall). A person does not forfeit constitutional protection simply by "combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech." *Hurley,* 63 U.S.L.W. at 4629. The protection *Hurley* afforded the parade organizers was not contingent on their having a coherent view to present to the rest of the world. It was enough that they had certain preferences about who should be included and who excluded.

Indeed, the petitioner's decision to exclude all political expression from its property is itself expressive activity that projects a more pointed message than any which the parade organizers wished to express. The apolitical ambiance of the petitioner's mall is evident from the moment one enters the door. It certainly would be odd if the petitioner could acquire First Amendment protection by posting a sign that says that it supports the United States' involvement in the Iraq war, but is treated as possessing no First Amendment right when it utters no words as to its views.

The First Amendment right to remain silent presented in this case, then, is governed by *Hurley.* To be sure, *Hurley* distinguishes *PruneYard Shopping Center v. Robins,* 447 U.S. 74 (1980), but the grounds of distinction either do not apply to the present case or are otherwise unconvincing. First, as stated before, the fact that the owner of the PruneYard Shopping Center was running a business establishment that was open to the public is no more dispositive than that the organizers were running a parade along the public streets of Boston.[3] And the benefit of the right to exclude unwanted speech is "enjoyed by business corporations generally and by ordinary people engaged in unsophisticated expression." *Hurley,* 63 U.S.L.W. at 4630.

Second, the distinction that the solicitations in *PruneYard* were " 'not likely [to] be identified with those of the owner,' " *id.* at 4632 (quoting *PruneYard,* 447 U.S. at 87), is refuted with

[3]Unlike the PruneYard Shopping Center, an open-air mall, The Mall at Short Hills is a wholly-enclosed shopping center.

respect to The Mall at Short Hills by the market research conducted by The Gallup Organization and introduced into evidence. This research showed that the respondents' message, in fact, will be associated with the mall enterprise and will affect the behavior of customers who shop at the mall.

Third, the further distinction that a mall owner may " 'expressly disavow any connection with the message by simply posting signs,' " *ibid.* (quoting *PruneYard,* 447 U.S. at 87), is a distinction without a difference in this case, as the record shows.[4] The individual shops in The Mall at Short Hills are chosen, designed, and operated (as are the individual segments of a parade) to contribute to the expression of a common theme and message; the message to the mall's targeted clientele is: you may shop in this very calm, very serene, luxurious atmosphere without hassle, disruption, or controversy. Accordingly, as with a parade, "there is no customary practice whereby private sponsors disavow 'any identity of viewpoint' between themselves and the selected participants." *Id.* at 4631. The Mall at Short Hills is not just some haphazard collection of unrelated shops. The owner selects each tenant from potential tenants to comport with the overall theme and high-fashion image of the mall. Even placement within the mall is carefully choreographed to provide a cohesive presentation and message to the customers, one of tranquility and refinement.[5] In this context, the owner has made a deliberate decision about the types of speech that it will admit on its private property, and inclusion of a contentious speaker, even with disavowal of his viewpoint, is hardly "practicable."

The final distinction of *PruneYard,* that, there, " 'the owner did not even allege that he objected to the content of the pamphlets,' " *ibid.* (quoting *Pacific Gas & Elect.,* 475 U.S. at 12),

[4]The record that came to this Court in *PruneYard,* on the other hand, was very limited because the trial court had granted summary judgment.

[5]Of course, like the mall owner's posting of signs, the parade organizer may include in the parade a marcher with a disclaimer sign preceding or following the offending parade unit. But such a disclaimer would be equally curious in the elegant Mall at Short Hills as it would be in a parade.

is simply inapplicable here. In the present case, it is an undisputed fact that the owner of The Mall at Short Hills disagreed with the respondents' political message. App. to Pet. for Cert. 143a ¶15. If a private club could exclude an applicant whose manifest views were at odds with a position taken by the club's existing members, *see Hurley*, 63 U.S.L.W. at 4632 (explaining *New York State Club Ass'n v. City of New York*, 487 U.S. 1 (1988)), and if a parade organizer may now exclude people marching on the public streets from displaying a message not wanted by the organizer, why must a shopping center owner who chooses to remain silent on controversial and confrontational issues be required to furnish a valuable portion of its private property to a political action group to espouse a cause expressly opposed by the owner?

For these reasons, we respectfully suggest that, as an alternative to granting the petition and hearing this case on the merits at this time (the petitioner's preferred alternative), the Court should grant the petition for a writ of certiorari, vacate the judgment of the Supreme Court of New Jersey, and remand the case to that court for reconsideration in light of this Court's intervening ruling in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*. That intervening decision has shed new light on First Amendment law which, if it had been available at the time of the state supreme court's decision, might have led to a different result.

Respectfully submitted,

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(4)

Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1994

SHORT HILLS ASSOCIATES, f.k.a. Prutaub Joint Venture,

*Petitioner,*

*vs.*

NEW JERSEY COALITION AGAINST WAR IN THE MIDDLE EAST, SYLVIA ACKELSBERG and DAVID CLINE,

*Respondents.*

*On Petition for a Writ of Certiorari to the Supreme Court of New Jersey*

## RESPONDENTS' BRIEF IN OPPOSITION

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## COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether the decision of the New Jersey Supreme Court holding that regional shopping centers could not totally prohibit the distribution of social and political literature on the common sidewalks and other areas outside the enclosed malls rested on adequate and independent state grounds?

2. Whether principles of *stare decisis* require the Court to deny the Petition for a Writ of Certiorari, inasmuch as the questions presented to the Court were fully and properly adjudicated in *Prune Yard Shopping Center v. Robins*, 447 U.S. 74 (1980).

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**APPENDIX**

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Respondents, New Jersey Coalition Against War in the Middle East, Sylvia Ackelsberg, and David Cline, respectfully submit that The Mall at Short Hills' ("petitioner") petition for a Writ of Certiorari to the Supreme Court of New Jersey should be denied.

## COUNTER-STATEMENT OF THE CASE

Respondents make the following corrections and additions to Petitioner's Statement of the Case:

1. Petitioner's petition seriously misapprehends the holding of the New Jersey Supreme Court in *New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp.*, 138 N.J. 326, 650 A.2d 757 (1994), by repeatedly asserting that the court authorized the distribution of literature in the common areas of the enclosed arcade. The opinion of Chief Justice Wilentz specifically held that among the reasonable regulations that a mall might enforce was one restricting expressional activity to "the parking lot, or to common sidewalks and other areas outside the enclosed malls."[1] *Id.* at 378, 650 A.2d at 783.

In light of that holding, petitioner's protests over possible interference with the mall's "monochromatic" architectural design, with its "carefully planned" environment, which is "attractive, comfortable, safe, heated in the winter, air-conditioned in the summer," Cert. Pet. at 6-7, 12, are totally meritless. Similarly irrelevant is petitioner's dissertation about eschewing kiosks in the arcade's common areas in order to avoid "denigrat[ing] the mall's aesthetic atmosphere and obscure sight

---

1. Although the New Jersey Supreme Court did not "exclude the *possibility* that the leafletting, to be effective may require access to the enclosed portion of the center," 138 N.J. at 378, 650 A.2d at 783 (emphasis supplied), nothing in the judgment, decision, or record in this matter would require any mall to permit expressive activities indoors.

lines to the stores," *id.* at 7, since the court below did not require that anything be placed in those interior common areas.

Indeed, respondents are mystified by petitioner's attempts to distinguish its "wholly-enclosed shopping center," *ibid,* from what it alleges to be the "open-air shopping center" involved in *Prune Yard.* Cert. Pet. at 12 n. 10. Since Chief Justice Wilentz's opinion authorizes The Mall at Short Hills to exclude people with petitions and leafletters from the "enclosed shopping center," 138 N.J. at 378, 650 A.2d at 783, the only place expressional activity must be allowed is in the "open air" outside the mall itself.

2. Petitioner also misstates the record and the opinion of the court below when it suggests that the case involves efforts by plaintiffs to "solicit[ ] contributions" at the shopping malls. Cert. Pet. at 5. Plaintiffs, in the hearings below, never asserted such a right, *see* 138 N.J. at 375, 650 A.2d at 782, and the court's opinion specifically excluded it:

> [O]ur ruling is confined to leafletting and associated free speech. . . . [T]he sale of literature and the solicitation of funds on the spot (as distinguished from appeals found in the leaflets themselves) are not covered by the protection.

138 N.J. at 375-76, 650 A.2d at 782.

3. Petitioner repeatedly trumpets a self-serving opinion poll it had commissioned and entered into evidence at trial ostensibly to show that some mall patrons would shop less or avoid a mall altogether "to shun leafletting or solicitation by political or religious groups." Cert. Pet. at 9, 12, 23, 23 n. 18. It is revealing that neither the trial court, nor the Appellate Division of the New Jersey Superior Court, despite finding in favor of the defendants,

felt the poll worthy of mention in support of their decisions. *New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp.*, 266 N.J. Super. 195, 628 A.2d 1094 (Ch. Div. 1991), *aff'd per curiam*, 266 N.J. Super. 159, 628 A.2d 1075 (App. Div. 1993), *rev'd*, 138 N.J. 326, 650 A.2d 757 (1994).

In addition, at no point in this litigation have any of the defendant malls, including The Mall at Short Hills, either at trial or on appeal, introduced *any* evidence or information indicating *any* loss of income, revenue, or business at California shopping malls, during the twelve years since California permitted leafletting in *Robins v. PruneYard Shopping Center*, 23 Cal.3d 899, 153 Cal. Rptr. 854, 592 P.2d 341 (1979), *aff'd*, 447 U.S. 74 (1980). 138 N.J. at 342-43, 343 n. 7, 650 A.2d at 765-766. As succinctly noted below: "This record does not support the proposition that one dollar's worth of business will disappear because of plaintiff's leafletting even though some shoppers and non-shoppers may not like it." 138 N.J. at 361, 650 A.2d at 775. Saliently, some of the defendant malls, including the petitioner, are operated by national companies that have facilities in both New Jersey and California.[2] Plainly, they were in a position to ascertain what, if any, economic losses they had sustained in California as a result of the *PruneYard* decision. Their failure to adduce such evidence can lead only to the conclusion, reached by the New Jersey Supreme Court, *ibid*, that no such economic losses ever occurred.

4. Petitioner would disassociate itself from its nine codefendants on the grounds that it does not allow "public service

---

2. *E.g.*, Stipulations as to the Mall at Short Hills, admitted into evidence 6/3/91, Resp. App. at ¶ 3. Deposition of Craig Perry, Manager of The Mall at Short Hills, 3/6/91, T8-13 to 15. Petitioner repeatedly cites to a public opinion poll it had taken, *e.g.*, Cert. Pet. at 13, but ignores the trial testimony of Dr. Herbert Abelson, which challenged the methodology and conclusions of the Petitioner's polling expert.

activities" at The Mall at Short Hills.[3] Cert. Pet. at 8. However, in addition to the extensive concert series and Christmas and Easter programs, the petitioner fails to acknowledge these other public events and public amenities stipulated-to by The Mall at Short Hills at trial:

> • The mall sponsors a fitness walk program, which allows access to the mall before daily business hours. The program is sponsored in cooperation with Morristown Memorial Hospital and open to all members of the public who register in writing and receive a license.
>
> • The mall is serviced by publicly subsidized New Jersey Transit buses and there is a New Jersey Transit bus shelter located on the mall's property.
>
> • The mall hires off-duty municipal police officers for mall security. The officers wear their uniforms, guns and badges while so employed. Municipal police cars sometimes patrol the mall parking lot and police officers enforce some traffic ordinances there.[4]

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3. Interestingly, in the state proceedings, the same defense counsel who represented The Mall at Short Hills, also represented another mall defendant, the Riverside Square. However, only The Mall at Short Hills, and not the Riverside Square mall, has filed this petition.

As is the case with many of the defendant malls, the Riverside Square engaged in numerous activities that were open to the public, *e.g.*, 138 N.J. at 384-85, 650 A.2d at 786-787, as distinct from the more limited activities permitted by The Mall at Short Hills. It is respectfully submitted that the shopping mall industry is strategically attempting to use a single regional mall that is less "open" than most as a vehicle for a broader attack on the rights accorded to the states and to the public under *PruneYard*.

4. "Stipulations as to the Mall at Short Hills," admitted into evidence on June 3, 1991 (Resp. App. at ¶¶ 8, 9, 10, 12 & 15).

The hearing below involved extensive testimony about the public activities of each of the defendant malls. Furthermore, the parties stipulated to the facts of the essential physical layouts of the malls.[5] The New Jersey Supreme Court carefully reviewed the record; while it found a lower level of public events and activities at The Mall at Short Hills than take place at other malls, the court concluded that "these differences in the degree of public activity are not material and will not exempt a regional mall from the obligation to permit free speech activity." 138 N.J. at 372-83, 650 A.2d at 780. The court held that regional shopping malls such as The Mall at Short Hills were distinguishable from other shopping centers because of their "mammoth size . . . the proliferation of uses, the all embracing quality of the implied invitation, and the compatibility of free speech with those uses," and, as a result, were compelled to uphold constitutional requirements of freedom of expression. *Id.* at 372, 650 A.2d at 780.

---

5. The Mall at Short Hills lies on 46 acres of land. In addition to featuring two major department stores, it contains ten food establishments and 130 other retail, banking, or professional outlets. 266 N.J. Super. at 209, 628 A.2d at 1102. In contrast, the Prune Yard Shopping Center covered only 21 acres, and had only approximately 75 tenants. *Prune Yard*, 447 U.S. at 77.

## REASONS FOR DENYING THE WRIT

Implicitly, petitioner asks the Court to overrule its unanimous fifteen-year-old decision in *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980). Such an extraordinary departure from settled rules of *stare decisis* would be virtually unprecedented.

Nor is there any reason for this Court to reconsider the basic principles of federalism on which *PruneYard* was based: (1) that it is up to each state "to define 'property' in the first instance," *id.* at 84, and (2) that a state is authorized to permit "more expansive rights of free speech and petition than conferred by the Federal Constitution." *Id.* at 85. Indeed, the basic principles of *PruneYard* were just reaffirmed by the Court in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 63 U.S.L.W. 4625, 4631 (U.S. June 19, 1995). In the past decade and a half, the Court has repeatedly cited *PruneYard* approvingly.

Petitioner's reliance on so-called compelled speech cases is misplaced. Unlike, for example, the organizers of a parade, the defendant shopping mall is not engaged in any type of "expressive activity." *See Hurley, ibid.* Moreover, even some property owners who regularly engage in First Amendment activity, such as the cable television company involved in *Turner Broadcasting System, Inc. v. FCC*, 114 S.Ct. 2445 (1994), may be compelled to facilitate the speech of others pursuant to a public regulation that serves "a compelling, or at least important governmental object" unrelated to the "alteration of speech," *Hurley*, 63 U.S.L.W. at 4631.

Petitioner's effort to resurrect the Fifth Amendment's Taking Clause argument, which was soundly rejected by this Court in *PruneYard*, is equally unpersuasive. As the New Jersey Supreme Court commented in rejecting this argument, "there is no

[constitutional] guarantee of compensation for the exercise of constitutional rights that does not result in even the slightest impact on business or profits." 138 N.J. at 372, 650 A.2d at 780. Furthermore, as set forth in respondents' Counter-Statement of the Case, petitioner's Taking Clause argument rests upon the wholly fallacious premise that the opinion below required it to open its enclosed arcade to leafletters,[6] when in fact the opinion indicated that leafletters could be restricted to the exterior sidewalks and parking lots.

The petitioner has set forth no special or important reasons, under the guidelines for consideration for a petition for a writ of certiorari, why the application should be granted. Rule 10.1. The law in this area was settled only fifteen years ago. *See* Rule 10.1(c). There are no conflicts, such as among the Courts of Appeals, that would require the Court to act. Rule 10.1(a). Notably, although state courts of last resort have differed as to whether their own constitutions should permit expression at their malls, these courts have not disagreed over the Taking Clause or compelled speech issues under the Federal Constitution. *See* discussion, *New Jersey Coalition*, 138 N.J. at 47-53, 650 A.2d at 768-70.

Most saliently, the decision palpably has not "so far departed from the accepted and usual course of judicial proceedings" to call for the supervision of the Court. Rule 10.1(a).

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6. Cert. Pet. at 22 ("the New Jersey court imposes state control over the core (and most valuable) portion of petitioner's property").

## I.

## THE REQUISITES OF *STARE DECISIS* MANDATE THAT THE COURT NOT REVERSE THE DECISION BELOW, AND REQUIRE THE COURT TO DENY THE PETITION FOR A WRIT OF CERTIORARI.

The petition before the Court represents a frontal assault on the holding in *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), a unanimous decision written by the Chief Justice just fifteen years ago. Petitioner claims that "in the 15-year interim since *PruneYard*," Cert. Pet. at 10, new constitutional doctrine has emerged which requires a different result. Under the mandates of the principles of *stare decisis*, the Court should leave the *PruneYard* decision undisturbed.[7]

It is axiomatic that "[a]lthough adherence to precedent is not rigidly required in constitutional cases, any departure from the doctrine of *stare decisis* demands special justification." *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984). Moreover, the decision whether to overrule established precedent must also take into consideration the extent to which the challenged doctrine "has become integrated into the fabric of the law." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S. Ct. 2791 (1992). Overruling such precedent not only may have consequences for "the ideal of the rule of law," but such precedent "is likely to have engendered substantial reliance." *Adarand*

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7. Since 1980, this Court has consistently reaffirmed the *PruneYard* holding. *E.g.*, *Hurley*, 63 U.S.L.W. at 4631; *Turner Broadcasting System, Inc. v. FCC*, 114 S.Ct. 2445, 2466 (1994); *Dolan v. City of Tigard*, 114 S. Ct. 2309, 2321 (1994); *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 225 (1986); *Public Gas & Electric Co. v. Public Utilities Comm'n*, 475 U.S. 1, 9-12 (1985); *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 191 (1985); *Roberts v. United States Jaycees*, 468 U.S. 609, 625 (1984).

*Constructors, Inc. v. Peña*, 63 U.S.L.W. 4523, 4532 (U.S. June 13, 1995). Adherence to precedent is the rule, not the exception; only those cases "duly tested by experience [and having] been found to be inconsistent with the sense of justice or with the social welfare . . ." should be considered for possible overruling. Benjamin N. Cardozo, *The Nature of the Judicial Process* 149 (1921).

Since *PruneYard*, numerous state courts of last resort have considered the issue of leafletting at shopping centers or other private property under their own constitutions, and at least five, in addition to California and New Jersey, have decided that their free speech provisions did protect such activity to some extent.[8] No reasonable person could believe that allowing leafletters and petition-gatherers onto the outside sidewalks of a forty-six acre shopping mall is inconsistent with a sense of justice or with social welfare.

Without doubt, there is no pressing policy reason that mandates the overturning of *PruneYard*.

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8. *See Lloyd Corp. v. Whiffen*, 315 Or. 500, 849 P.2d 446 (1993); *Bock v. Westminster Mall Co.*, 819 P.2d 55 (Colo. 1991); *Batchelder v. Allied Stores Int'l*, 388 Mass. 83, 445 N.E. 2d 590 (1983); *Alderwood Assoc. v. Washington Environmental Council*, 96 Wash. 2d 230, 635 P.2d 108 (1981); *see also, Commonwealth v. Tate*, 495 Pa. 158, 432 A.2d 1382 (1981), and *Western Pennsylvania Socialist Workers 1982 Campaign v. Connecticut General Life Ins. Co.*, 512 Pa. 23, 515 A.2d 1331 (1986).

## II.

## REQUIRING THE MALL AT SHORT HILLS TO ACCOMMODATE LEAFLETTERS AND PETITION-GATHERERS DOES NOT CONFLICT WITH THE MALL'S FIRST AMENDMENT RIGHTS, AND DOES NOT REPRESENT STATE COMPULSION OF SPEECH.

The petitioner maintains that the decision of the New Jersey Supreme Court in *New Jersey Coalition* is tantamount to forcing The Mall at Short Hills to subsidize the petitioner's political speech. Cert. Pet. at 11 to 20. This concern is misplaced; the decision below in no way treads upon The Mall at Short Hills' rights under the First Amendment of the United States Constitution.

In *PruneYard Shopping Center v. Robbins,* 447 U.S. 74, 85-89 (1980), the Court held that a state's protection of expressive activity at a privately-owned shopping mall was not a "forcing" of a private party to use his property as a forum for speech by others. The Court reaffirmed a state's "sovereign right to adopt in its own constitution individual liberties more expansive than those conferred by the Federal Constitution." *Id.* at 81 (citing *Cooper v. California,* 386 U.S. 58 (1967)).

The Court held that a shopping mall was "a business establishment open to the public to come and go as they please," and thus was not limited to personal use. 447 U.S. at 87. In addition, the Court also held that it was quite unlikely that the public could confuse the views of people seeking signatures or passing out leaflets with those of the mall's owners. *Ibid.* Finally, the Court determined that the owner can disavow any connection with messages "by simply posting [disclaimer] signs in the area where the speakers or handbillers stand." *Ibid.*[9]

9. The Court also noted that the state was not requiring the owner of the mall to display a specific message on the property. 447 U.S. at 87.

Little in this case distinguishes it, factually, from *PruneYard.* The petitioner has barely even argued why the measures suggested in *PruneYard* would be an ineffective prophylaxis to its specter of compelled or subsidized speech.

The *New Jersey Coalition* decision lies squarely within the ambit permitted by *PruneYard.* The New Jersey Supreme Court limited leafletters and petition gatherers to the *outside* of the mall. *New Jersey Coalition,* 138 N.J. at 378, 650 A.2d at 783.[10]

The post-1980 cases cited by the petitioner create no implication that *PruneYard's* basic holding should be disturbed.[11] In *Pacific Gas and Electric Co. v. Public Utilities Commission,* 475 U.S. 1, 15 (1986), the Court held that the First Amendment proscribed a state from requiring a privately-owned public utility to include messages in its billing envelopes. However, the Court distinguished *PruneYard* at length, noting that the mall "was the open area of a shopping center into which the general public had been invited [and] was, almost by definition, peculiarly public in nature." *Id.* at 12 n. 8. The Court also observed that the mall's owner could exercise his own expressional rights on the facility itself. *Id.* at 12.[12] Moreover, the regulation in *Pacific Gas* required that materials of a certain viewpoint be disseminated, *ibid;* such a

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10. *See* Counter-Statement of the Case, *ante.*

11. The Mall at Short Hills places heavy reliance upon *Wooley v. Maynard,* 430 U.S. 705 (1977), where the Court permitted a motorist, under the First Amendment, to cover-over an unwanted slogan on an automobile license tag. However, the Court, in *PruneYard,* already distinguished *Wooley.* 447 U.S. at 87.

12. The Court also noted in *PruneYard* that the mall's owners did not allege that they disagreed with the plaintiff's messages, which The Mall at Short Hills has contended here. Given the size of the petitioner's mall, and the other factors found in this openness, *see New Jersey Coalition,* 138 N.J. at 338-

(Cont'd)

content-based requirement clearly violated the First Amendment, bringing to bear considerations not present here.

The petitioner also cites to *Roberts v. United States Jaycees,* 468 U.S. 609 (1984). However, in *Roberts,* the Court, citing to *PruneYard,* 447 U.S. at 81-88, reaffirmed that "[a] State enjoys broad authority to create rights of public access on behalf of its citizens." 468 U.S. at 625. The Court held that the First Amendment was no bar to a state's requirement that a private organization, the Jaycees, admit women; such a mandate was no impediment to the ability of the Jaycees to engage in protected political activities or to disseminate its views. *Id.* at 627. The rights to expression possessed by a huge, regional shopping mall, and its ability to distance itself from the message of leafletters and petitioners, are plainly protected by the safeguards suggested in *PruneYard.*[13]

The *PruneYard* decision was again cited with approval in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston,* 63 U.S.L.W. 4625, 4631 (U.S. June 19, 1995). The Court

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(Cont'd)
43, 372-73, 650 A.2d at 746-66, 780-81, this attempted refined distinction by the petitioner is inconsequential.

The New Jersey ruling is both content and viewpoint neutral. Groups which agree or disagree with the so-called views of The Mall at Short Hills may both take advantage of it.

13. In *Lehnert v. Ferris Faculty Ass'n,* 111 S. Ct. 1950, 1955, 1963-64 (1991), relied upon by The Mall at Short Hills, the Court, under the First Amendment, voided a rule permitting a union to charge public employees it represented fees for engaging in lobbying efforts. Palpably, The Mall at Short Hills is not being compelled or asked to donate money to the respondent's organization. Although the petitioner argues that it will incur insurance costs, no evidence of such extra expense was adduced at trial, and any such problems can be addressed through regulation.

found that Boston's St. Patrick's Day parade itself was expressive activity; in sharp contrast, the "proprietors [of a shopping mall] were running a business establishment that is open to the public to come and go as they please." *Ibid.*

*PruneYard* is a case that is full of vigor, and nothing suggested by the petitioner could even remotely lead to the conclusion that it should be overturned.

Equally evident is that the *New Jersey Coalition* decision was carefully decided and crafted. The New Jersey Supreme Court assessed the record of the activities of each of the defendant malls and came to a fair and considered opinion. 138 N.J. at 338-43, 372-73, 650 A.2d at 763-766, 780. The Court reasonably and accurately balanced the rights of the owners of the regional shopping malls against the need of the public for access to places to disseminate ideas. Indeed, as noted in the opinion for this Court in *International Society for Krishna Consciousness v. Lee*, 112 S. Ct. 2711, 2714 (1992), the act of "peaceful pamphleteering" is in no way incompatible with a multi-purpose environment such as a shopping mall.[14]

In addition, the New Jersey Supreme Court's holding is based, in part, upon knowledge of the conditions prevalent in New Jersey, a very highly suburbanized state with several impoverished, formerly industrialized cities. *Id.* at 346-47, 650 A.2d at 767-768. The State court system has concluded, under New Jersey's Constitution, *N.J. Const.* art. I, ¶¶ 6 and 18, that the public's interest would be best served by this very limited intrusion upon the rights of the private owners of property. There plainly is no need for a national standard limiting the right to expression at a regional shopping mall.

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14. Although the forum involved was an airport, Justice O'Connor's opinion observed that "the Port Authority is operating a shopping mall as well as an airport."

## III.

## THE DECISION OF THE NEW JERSEY SUPREME COURT IS CONSONANT WITH THE TAKING CLAUSE OF THE FIFTH AMENDMENT.

Thee petitioner maintains that the decision of the New Jersey Supreme Court in *New Jersey Coalition* transgresses upon the Taking Clause of the Fifth Amendment. Its argument is misplaced. In 1980, in *PruneYard Shopping Center v. Robins,* 447 U.S. at 82-85, the Court fully addressed the Taking Clause issue. Much as in the instant matter, in *PruneYard,* people set up a card table at a shopping mall, distributed pamphlets, and asked people to sign petitions to be sent to government officials. *Id.* at 77. The Court held that the factors that must be examined were "the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations." *Id.* at 83. The Court concluded that this "clearly [did] not amount to an unconstitutional infringement of [a mall owner's] property rights under the Taking Clause." *Ibid.* The Court noted that the mall could establish regulations that would minimize interference with the establishment's operation. *Id.* at 83-84.

Seemingly, the petitioner attempts to cast the adverse *PruneYard* holding as being the result of the failure of the attorney representing the PruneYard Shopping Center to present sufficient evidence. Cert. Pet. at 12, 15, 21. However, the petitioner brings nothing more than a naked assertion, apparently based on its self-serving poll and subjective and irrelevant assertions about the Mall's "unique architectural design," *ibid,* that the evidence in this case differs from that presented in *PruneYard.* The Mall at Short Hills looks about the same as any other regional shopping mall. All regional shopping malls, including the PruneYard Shopping Center, The Mall at Short

Hills, and the others named in the action below, were designed "with the view of the maximization of sales and the return on the owner's investment." *See id.* at 22.[15] Most significantly, the *PruneYard* decision was cited with approval only last year, in *Dolan v. City of Tigard,* 114 S. Ct. 2309 (1994), a Taking Clause case.

In analyzing what may constitute an unconstitutional taking of private property, the Court has focused on two discrete issues. *Lucas v. South Carolina Coastal Council,* 112 S. Ct. 2886, 2893 (1992). First, a taking occurs when the regulations "compel the property owner to suffer a physical 'invasion' of his property. In general (at least with regard to *permanent* invasions) . . . we have required compensation." *Ibid* (emphasis supplied) (citing *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419 (1982)). Second, a taking happens when "regulation denies all economically beneficial or productive use of land." 112 S. Ct. at 2893-94. *See also, Dolan v. City of Tigard,* 114 S. Ct. at 2321 (not permitting a permanent recreational easement on private property, but approving of *PruneYard* holding).[16]

Two conclusions are evident: the New Jersey Supreme Court

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15. Without citing to the record, the petitioner pleads that The Mall at Short Hills is designed to attract "upscale" customers; this is said to make the mall "unique." Cert. Pet. at 21. The wealthy are as interested in public affairs as are the rest of society. Local environmental issues frequently arise in New Jersey; there is no reason to deny the wealthy an opportunity to reach others at what plainly is the predominant regional facility, The Mall at Short Hills.

16. Petitioner's claim for "payment" for the supposed easement created by having leafletters on its property periodically, Cert. Pet. at 25, appears to be rhetorical. At no point in this litigation has the petitioner attempted to set forth what value it believes is lost by having leafletters at its facility. The petitioner's loud tocsins and klaxons to the contrary notwithstanding, the State of New Jersey is not expropriating the mall, nor *collectivizing* it, Cert. Pet. at 10, 25, nor confiscating it, nor permanently occupying it with squatters.

has not permitted a permanent occupation of a mall, and it most certainly does not deny its owners all economically beneficial use. The petitioner unconvincingly argues that the holding below has created "a *permanent* easement. . . ." Cert. Pet. at 24 (emphasis in original). In no way does the *New Jersey Coalition* holding permit people to continuously pass to and fro, or to permit the mall to be continually traversed. *See ibid (citing Nollan v. California Coastal Commission*, 483 U.S. 825 (1987)).[17]

In reality, the petitioner seeks an overthrow of the categories enunciated in *Lucas*. Cert. Pet. at 24.[18] There is no sound basis, either in the facts of the case, the law, or social welfare, for an overruling of this most recent of precedents, especially when coupled with its affirmance of rights to freedom of expression to a broad spectrum of the people of New Jersey. The petitioner has raised no compelling reason why *stare decisis* should be abandoned, and why *PruneYard's* Fifth Amendment Taking Clause analysis should be reconsidered.

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17. Petitioner cites to *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), in support of the "to and fro" argument. In *Nollan*, the Court distinguished a shopping mall situation. It held that "[t]he holding in *PruneYard*. . . . is not inconsistent with this analysis, since there the owner had already opened his property to the general public, and in addition permanent access was not required." 483 U.S. at 832 n. 1. The petitioner candidly admits that *Nollan* distinguished *PruneYard*. Cert. Pet. at 24 n. 20.

18. The petitioner wishes to "stitch together" "temporary occupations" of private property to rise to the level of a Taking Clause violation. This approach violates the sound policy set forth in *Lucas*, 112 S.Ct. at 2893, and in no wise should be applied to a case involving freedom of expression.

## CONCLUSION

The petition for a writ of certiorari to the Supreme Court of New Jersey should be denied.

Respectfully submitted,

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## APPENDIX — STIPULATIONS DATED MAY 31, 1991

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SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
BERGEN COUNTY

DOCKET NO. C-477-90E

Civil Action

NEW JERSEY COALITION AGAINST WAR IN THE MIDDLE EAST, et al.,

Plaintiffs,

v.

J.M.B. REALTY CORP., d/b/a RIVERSIDE SQUARE, et al.,

Defendants.

## STIPULATIONS AS TO THE MALL AT SHORT HILLS

The undersigned, counsel for Plaintiffs, and counsel for Defendant Prutaub Joint Venture, hereby stipulate that the following may be admitted as uncontested fact:

1. The Mall at Short Hills (Short Hills) is a regional

shopping center situated on forty-six acres of land, located at the intersection of Route 24 and John F. Kennedy Parkway in Essex County, New Jersey.

2. Short Hills was purchased by Prutaub Joint Venture in approximately 1980 and was not, at that time, a wholly enclosed mall as it exists today. Prutaub Joint Venture did additional development to create the wholly enclosed mall that exists currently.

3. Short Hills is currently owned by Prutaub Joint Venture. The Taubman Company, Inc., is the managing agent for Short Hills, as well as malls in California and Connecticut.

4. Short Hills has two (2) department stores, approximately ten food establishments, and approximately 130 other tenants, including two banks, two beauty salons, an optometrist, a shoe repair, drug store, art galleries and two brokerage houses.

5. Short Hill is a fully enclosed shopping center with two (2) levels and five thousand two hundred (5,200) parking spaces. Approximately 148,056 square feet of the mall are designated as common areas.

6. There are various benches and various plants scattered throughout the common area. There are benches scattered along the perimeter sidewalk.

7. Short Hills is currently open from 10 a.m. to 9:30 p.m. on week days, 10 a.m. to 6 p.m. on Saturdays, and 12 noon to 5 p.m. on Sundays. These hours vary in the summer.

*Appendix*

8. Short Hills is serviced by New Jersey Transit buses. There is a New Jersey Transit bus shelter located on the property owned by Prutaub Joint Venture, at the outside perimeter of the parking lot surrounding the mall.

9. Prutaub Joint Venture occasionally hires off-duty Millburn police officers for mall security. The officers wear their uniforms, guns, and badges, while they are so employed.

10. On their patrols, Millburn municipal police officers sometimes drive through the Short Hills parking lots. The Millburn municipal police officers enforce some of the traffic ordinances such as illegal use of handicapped parking spaces.

11. Short Hills has adopted a written trespass policy prohibiting expressive activity anywhere on mall property by anyone. Said policy, by way of example, prohibits soliciting, petitioning, collecting signatures, speech making, and distributing handbills.

12. On November 10, 1990, a representative of the Coalition handed out literature in the interior common areas of Short Hills. She was approached by Richard Hackett and a Short Hills security guard and given a copy of the mall's "Policy on Trespassing."

13. Short Hills has a permanently fixed stage which can and is used for special events. This area can accommodate a seated and/or standing program.

14. Short Hills has sponsored the following events in 1990 and 1991:

*Appendix*

- Mini Symphony performance of June 4
- Morris Nanton Jazz Trio
- String Ensemble of June 25
- September Fall Concert Series
    1. Nelson Riddle Orchestra
    2. Tommy Dorsey Orchestra
    3. Classical Beethoven and Bach
    4. Guitars of Splendor
    5. Glenn Miller Orchestra
    6. Morris Nanton Jazz Trio
    7. Piano Concerto
    8. Classical Mozart by mini-symphony
- Special Performance of Count Basie Orchestra
- Santa Claus
- Peter Rabbit Easter program and display
- Valentine's Day piano concert series

*Appendix*

These events were scheduled during mall hours. The September concert series was held on eight consecutive Sundays from 2 p.m. to 3 p.m.

15. Short Hills sponsors a fitness walk program, which allows access to the mall before daily business hours, from 7:30 a.m. until 10:00 a.m. The program is sponsored in cooperation with the Morristown Memorial Hospital, and open to all members of the public, who register in writing and receive a license. Over two hundred people have registered with the mall for the program.

16. Most mall patrons come to Short Hills by private automobile and park in parking lots located on mall property.

17. The enclosed mall area at Short Hills is completely surrounded by walkways and/or parking areas which are wholly located on the mall's property. There are no public streets or walkways between the parking areas and bus stop and the enclosed mall.

18. Short Hills is unaware of claims for damages or injury filed against the mall as a result of activity conducted by non-commercial organizations within the common area of the mall.

s/ Jo Ann Burk
Jo Ann Burk
Attorney for Defendant Short Hills

s/ Frank Askin
Frank Askin
Attorney for Plaintiffs

DATED: May 31, 1991

Supreme Court, U.S.
FILED
AUG 8 1995
CLERK

(6)

No. 94-1925

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1994

SHORT HILLS ASSOCIATES, f.k.a.
Prutaub Joint Venture, *Petitioner,*

*v.*

NEW JERSEY COALITION AGAINST WAR IN THE MIDDLE EAST, SYLVIA ACKELSBERG, and DAVID CLINE, *et al., Respondents.*

**On Petition for a Writ of Certiorari to the Supreme Court of New Jersey**

## PETITIONER'S REPLY BRIEF

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NEW JERSEY COALITION AGAINST WAR IN THE
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**On Petition for a Writ of Certiorari to the Supreme Court of New Jersey**

# PETITIONER'S REPLY BRIEF

The respondents, understandably, now trivialize the decision of the Supreme Court of New Jersey in *New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp.*, 138 N.J. 326, 650 A.2d 757 (1994) (4-3 decision), which, until their brief in opposition, they touted in the press as a monumental development. They do so by asserting that the opinion really applies only to "the 'open air' outside the mall itself," Br. in Opp'n at 2, and that it is indistinguishable from *PruneYard Shopping Center v. Robins,* 447 U.S. 74 (1980). *See id.* at 11. They are wrong on both counts.

Indeed, rather than address the substantial constitutional questions presented, the respondents instead suggest in their first "counter" question that there is no basis at all for review by this Court because the New Jersey court's decision "rested on adequate and independent state grounds." *Id.* at i. It is, however, irrelevant that the New Jersey court's ruling was based upon its

state constitution since the individual states may not, by their constitutions or by their laws, infringe a citizen's rights under the Constitution of the United States. Yet this is exactly what the New Jersey court has done. It has compelled the petitioner to create at its own expense a forum from which the respondents may preach their politics even in the face of the petitioner's undisputed opposition to those views.

This case, then, presents two issues. First, whether a state court order that requires a property owner to furnish a valuable portion of the owner's private property to political and social action groups to espouse causes opposed by the owner constitutes a forced subsidization of another's speech in violation of the First Amendment? Second, whether such a state court order that essentially grants to those groups an easement across private property, without using either the state's power of eminent domain or paying for the easement, violates the Takings Clause of the Fifth Amendment?

## I. THE FIRST AMENDMENT PROHIBITS THE STATE FROM COMPELLING ONE CITIZEN TO SUBSIDIZE THE POLITICAL OR SOCIAL CAUSES OF ANOTHER BY CREATING A FORUM FOR THE OTHER'S LEAFLETING

The assertion in the respondents' second "counter" question, that the questions presented by the petitioner "were fully and properly adjudicated in *PruneYard*," Br. in Opp'n at i, is simply not true.[1] *PruneYard* did not address the question of whether the state court may force one private citizen to create on private property, and subsidize at his own expense with security, cleaning, electricity, heating, air conditioning, and upkeep, as well as with insurance, a forum for another's political speech where no such

[1] While the respondents assert that "this Court has consistently reaffirmed the *PruneYard* holding," Br. in Opp'n at 8 n.7, it would be more accurate to state that the Court has consistently *distinguished PruneYard*, sometimes on more tenuous grounds than at other times.

forum previously existed.[2] The *PruneYard* Court's reasoning quoted by the respondents was that a shopping center is " 'a business establishment [sic] open to the public to come and go as they please,' " *id.* at 10 (quoting *PruneYard*, 447 U.S. at 87), and the owner can (however effectively or ineffectively) "disavow any connection with messages." *Ibid.* But neither the ability of the public to come and go nor the alleviation of confusion addresses the question of compelled subsidization.[3]

The respondents try to deflect attention from the New Jersey court's forced subsidization of the Coalition's speech by asserting that the decision does not require The Mall at Short Hills to permit indoor access to political and social action groups. This misreading of the decision is disingenuous. The Coalition sought political access to the interior portions of the petitioner's shopping mall, *see* Compl. ¶18, and the state supreme court permitted the free speech sought by the respondents.[4] Moreover, even this exterior-interior distinction is not meaningful to the subsidy

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[2] Nor was the *PruneYard* Court presented with the factual record developed here through stipulations and 11 days of trial testimony, including the uncontested fact that the owner of The Mall at Short Hills disagrees with the message that the Coalition would force the owner to underwrite simply because the owner has successfully developed and successfully operates the property.

[3] Even if the questions raised in the petition dictate overruling *PruneYard*, the doctrine of *stare decisis* does not militate against such a result. As Justice Reed observed in *Smith v. Allwright*, 321 U.S. 649, 665 (1944):

> In constitutional questions, where correction depends upon amendment and not upon legislative action this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions. This has long been accepted practice, and this practice has continued to this day. This is particularly true when the decision believed erroneous is the application of a constitutional principle rather than an interpretation of the Constitution to extract the principle itself.

(Footnotes omitted.) Moreover, the very fact that this Court has consistently found itself distinguishing *PruneYard* rather than applying its doctrine, frequently by importing distinctions without any true difference, provides ample reason to overrule the opinion. *See Hubbard v. United States*, 115 S.Ct. 1754, 1765 (1995) (Scalia, J., concurring).

[4] The respondents' quotation in footnote 1 of their brief, Br. in Opp'n at 1 n.1, is a highly selective redaction of the text. Having granted the Coalition

question since virtually all of the expenses that are incurred by the mall owner and its tenants for the interior spaces are likewise incurred for the center's private sidewalks and parking lots. After all, the parking areas and entranceways are the areas of first impression to customers, and they must be cleaned, lighted, maintained, secured, and insured. If the organizers of 20,000 marchers parading on the *public streets* of South Boston and drawing one million watchers cannot be required to include a group imparting an unwanted message, *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston,* 63 U.S.L.W. 4625 (U.S. June 19, 1995) (No. 94-749), what possible constitutional justification is there to force private citizens on their own private property to provide a forum for, and subsidize, unwanted messages?[5]

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access to the defendant-shopping malls, the New Jersey court, in discussing the permissible scope of time, place, and manner regulations, said:

> Limits on the place of exercise of the right may *perhaps* properly confine the exercise of free speech rights to the parking lot, or to common sidewalks and other areas outside the enclosed malls. We do not at all, however, exclude the possibility that the leafletting, to be effective, may require access to the enclosed portion of the center.

*New Jersey Coalition*, 133 N.J. at 378, 650 A.2d at 783 (emphasis added). This is the only reference in the opinion to the exterior of the malls, which the respondents now claim for the first time limits the holding. Clearly what the court was suggesting was that, on balance, the owners' property interests, and thus their power to impose regulations concerning the exercise of speech on their property, was broader in the interior, versus the exterior, of their enclosed malls.

[5] The respondents argue that the petitioner has no First Amendment right because it is not engaged in any expressive activity. Br. in Opp'n at 6. Yet even the New Jersey court conceded that the operation of the defendant-shopping malls included expressive uses and "some element of speech." *New Jersey Coalition*, 138 N.J. at 358, 650 A.2d at 773. Although not vocal, the owner of The Mall at Short Hills is engaged in deliberate expressive activity that defines the mall to its customers, both by its presentation through selection of tenants, architecture, and advertising, and by excluding all expression that is "controversial in nature or confrontational." *New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp.*, 266 N.J. Super. 195, 203, 628 A.2d 1094, 1099 (Ch. Div. 1991). Indeed, the petitioner's decision to exclude all political expression from the property - and the immediately evident apolitical ambiance

## II. THERE IS NO INVITATION TO LEAFLET, AND THE FIFTH AMENDMENT PROHIBITS THE STATE FROM GRANTING AN EASEMENT FOR POLITICAL LEAFLETING ON PRIVATE PROPERTY WITHOUT JUST COMPENSATION TO THE OWNER

The "implied invitation to leaflet" that is the basis of the court's holding, *see New Jersey Coalition,* 138 N.J. at 357, 372, 650 A.2d at 772, 780, is purely a fiction. The Mall at Short Hills has an *express*, publicly-known policy prohibiting leafleting and other political expression. The mall has never allowed political functions in its common areas, nor does it permit charitable groups to solicit there. App. to Pet. for Cert. 144a ¶¶18, 19. The Coalition knew in advance and understood that it was not welcome at the mall to petition, and it so alleged in its state-court complaint. *See* Compl. ¶18. The only invitation that the Coalition received was from the New Jersey court! It is difficult to comprehend how the state court's "finding" of an implied invitation could overcome the petitioner's *express* policy and be used to "take" the petitioner's own constitutional right to control the activity permitted on its private property, especially when the activity is the expression of political views that the petitioner opposes.

The respondents attempt to bolster the court's "finding" of an invitation by highlighting the "public events and public amenities" in The Mall at Short Hills: a fitness walk program, a New Jersey Transit bus shelter, and the hiring of off-duty police officers for mall security. Br. in Opp'n at 4. These are the only "public events" that the respondents can find in The Mall at Short Hills! Never mind that the fitness walk program is conducted *before* daily business hours, Resp'ts' App. 5a ¶15, as a marketing tool to get customers to come to the mall and stay during the "slow" opening hours of business and shop; the New

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of the petitioner's mall - is itself expressive activity that projects a more pointed message than any which the parade organizers might have wished to express. The autonomy of a citizen to remain silent on subjects he "would rather avoid" is a fundamental rule of protection under the First Amendment. *Hurley,* 63 U.S.L.W. at 4630.

Jersey Transit bus shelter is located "at the *outside perimeter* of the parking lot surrounding the mall," *id.* 3a ¶8 (emphasis added), and it was put up at the demand of the transit authority, not at the invitation of the mall owner; and the off-duty officers are *hired* at great expense by the mall during the peak holiday season to provide additional security.[6]

The respondents, as well as the New Jersey court, completely ignore the testimony of the Coalition's own political expert that the municipalities surrounding the shopping centers provide more and better opportunities for leafleting than ever before (not even considering the enhanced opportunities presented by cable television and computer technology). Nor do they or the court even mention that the Coalition had successfully conducted public hearings in Jersey City, teach-ins and public forums at churches and universities, gatherings at state congressional offices, a rally at McGuire Air Force Base, and vigils at local hospitals, among other activities. Indeed, without access to shopping malls, the Coalition handed out over 85,000 leaflets during the two weeks preceding the hearing on its motion for a temporary restraining order. No showing was made, or could have been made, that the Coalition had no "adequate alternative avenues of communication." *Lloyd Corp. v. Tanner,* 407 U.S. 551, 567 (1972).[7]

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[6] The respondents never pressed a claim that the mall's conduct had the character of state action. It is mystifying, then, why public bus service and the occasional presence of off-duty municipal police officers should have any relevance to the questions presented by this case.

[7] The respondents' further argument that The Mall at Short Hills introduced no evidence indicating loss of revenue at California shopping malls, Br. in Opp'n at 3, is hypocritical. The respondents *objected* to The Mall at Short Hills' proffer of that very evidence with respect to a Connecticut shopping mall; the objection was on the ground that the evidence was not relevant to the circumstances in New Jersey. The trial judge sustained the objection and ruled that no out-of-state evidence - Connecticut or California - would be admitted. In fact, however, the market survey evidence in the record - again, completely ignored by the state supreme court - certainly shows that business would be lost as a result of political and social action leafleting. *See* App. to Pet. for Cert. 146a-169a.

The respondents also argue that the state supreme court "reasonably and accurately balanced the rights of the owners of the regional shopping malls against the need of the public for access to places to disseminate ideas." Br. in Opp'n at 13. The court did no such thing. Rather, the court eschewed the facts in the record, depending instead on its "belief" that "the right of freedom of speech" is "fundamentally more important" than private property rights, and that "the correct resolution of the conflict between those rights is self-evident." *New Jersey Coalition*, 138 N.J. at 371, 650 A.2d at 780.

Even if somehow there were an implied invitation, under hornbook principles of property and contract law, the owner of private property may revoke his invitation and limit access to a particular purpose. Indeed, even "[w]ith respect to *public* property that is not a designated public forum open for indiscriminate public use for communicative purposes . . . '[c]ontrol over access . . . can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.' " *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 113 S.Ct. 2141, 2147 (1993) (quoting *Cornelius v. NAACP Legal Defense and Ed. Fund, Inc.*, 473 U.S. 788, 806 (1985)) (emphasis added). Yet this is not so after *New Jersey Coalition*. The Mall at Short Hills is now essentially public property (because it "closely resembles public property," *New Jersey Coalition*, 138 N.J. at 333, 757 A.2d at 761) with the "correspondingly broad" invitation to use the property dictated by the state. *Ibid.* The owner may not limit access by posting signs at the door that the invitation extended is only to shop, nor, presumably, may the owner limit political access by charging an admission fee. Under *New Jersey Coalition*, the state has granted a permanent and irrevocable easement of access to political and social groups to occupy what was once private property. Equally pernicious, the state has imposed on the property owner the governmental duty of regulating the so-called free speech rights of others, as well as the obligation of preserving those so-called rights by providing security and insurance. These are obligations of the state, not individual citizens, and the state court may not, by judicial decree,

impose governmental burdens on a select few or take their property for public use without just compensation. For governmental action as intrusive as that of the Supreme Court of New Jersey, close judicial review under the Constitution of the United States is essential.

## Conclusion

For these reasons, as well as those urged in the petition, the petition for a writ of certiorari should be granted.

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